*Second Edition. Now Complete in 15 Volumes.*

**Price £15 15s. Cash with order £14 19s. 3d.**

# ENCYCLOPEDIA

OF THE

# LAWS OF ENGLAND

WITH

## FORMS and PRECEDENTS.

THE work has been completed in a definite number of volumes and within a definite date.

It is not a collection of small text books, but is a work which enables the enquirer to find with a minimum of time and trouble the point he is in search of, and does not necessitate first a reference to an index. It contains numbers of articles on subjects not to be found in any other work.

The articles are all written by competent lawyers whose names guarantee accuracy, and their work does not need supervision by judges.

It will be kept up to date by annual cumulative supplements with a permanent volume every five years.

It may be obtained at the published price on easy terms of payment.

Full particulars and a specimen article will be sent on application to

**SWEET & MAXWELL, Ltd.,**

**3, CHANCERY LANE, LONDON.**

# SWEET & MAXWELL

# STUDENT'S SERIES.

"The 'Student's Series,' initiated by the enterprise of Messrs. Sweet & Maxwell, has taken a permanent place in legal literature, and is evidently meeting with the success it deserves. What is the secret of this popularity of the Student's Series? It is that the little books which compose it do not, as so many valuable legal works do, overburden the mind of the student at first, starting with too many details, too many technicalities. They give a plain outline of the subject, sketched by the hand of an expert, and they leave the student to fill in as his reading and experience progress." —*Legal Literature*, December, 1905.

**REAL PROPERTY LAW.** By W. H. H. KELKE. 4th edit. 6*s*. 1907

**PERSONAL PROPERTY LAW.** By W. H. H. KELKE. 3rd edit. 6*s*. 1910

**ROMAN LAW.** By W. H. H. KELKE. 6*s*. 1901

**LEADING CASES IN EQUITY.** Founded on White and Tudor's Leading Cases. By W. H. H. KELKE. 2nd edit. 6*s*. 1910

**INTERPRETATION OF DEEDS.** Founded on Elphinstone's Rules. By W. H. H. KELKE. 6*s*. 1901

**STUDENT'S CONVEYANCING PRECEDENTS.** By J. W. CLARK. 3rd edit. 6*s*. 1905

**LAW OF TORTS.** By H. FRASER. 7th edit. 8*s*. 1908

**LAW OF CONTRACT.** By A. T. CARTER. 2nd edit. 7*s*. 6*d*. 1907

**COMPANY LAW.** By W. H. H. KELKE. 2nd edit. 6*s*. 1909

**BANKRUPTCY LAW.** By E. MANSON. 7*s*. 6*d*. 1904

**EASEMENTS.** By T. T. BLYTH. 6*s*. 1905

**CRIMINAL LAW.** By A. M. WILSHERE. 7*s*. 6*d*. 1906

**PROCEDURE AND EVIDENCE.** By A. M. WILSHERE. 6*s*. 1906

**CASES IN CONSTITUTIONAL LAW.** By W. H. H. KELKE. 6*s*. 1907

**LEADING CASES ON EVIDENCE.** By E. COCKLE. 7*s*. 6*d*. 1907

**LAW OF WILLS.** By J. A. STRAHAN. 7*s*. 6*d*. 1908

**LAW OF MORTGAGES.** By. J. A. STRAHAN. 7*s*. 6*d*. 1909

**ANALYSIS OF WILLIAMS' REAL PROPERTY.** By A. M. WILSHERE. 3*s*. 1908

**ANALYSIS of WILLIAMS' PERSONAL PROPERTY.** By A. M. WILSHERE.

**ROMAN LAW EXAMINATION GUIDE.** By J. A. SHEARWOOD. 7*s*. 6*d*. 1910

MIDDLE TEMPLE LIBRARY
WITHDRAWN STOCK

B258 HA

# HAYES & JARMAN'S

## CONCISE

# FORMS OF WILLS,

WITH

## PRACTICAL NOTES.

THIRTEENTH EDITION.

BY

J. B. MATTHEWS,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

"*Let's choose executors and talk of wills.*"

RICH. II., ACT 3, SC. 2.

LONDON:

SWEET AND MAXWELL, LIMITED

3, CHANCERY LANE, W.C.

1910

KN 125 HAY

# PREFACE

## (TO THE THIRTEENTH EDITION).

In preparing the eleventh edition (1897) the precedents and notes were carefully revised, and some new notes inserted. All references to authorities cited were carefully checked.

In the present edition references have been added to the Revised Reports. References have also been made in the notes to all cases reported down to the end of the year 1909.

Once again I have to tender my warmest thanks to my friend Mr. John Arthur Slater, of the Middle Temple, Barrister-at-Law, for the very great assistance which he has given me in preparing the present edition for the press.

J. B. MATTHEWS.

2, Paper Buildings, Temple.
*January*, 1910.

# PREFATORY REMARKS

## (TO THE FIRST EDITION).

THOUGH many works on Wills, with the accompaniment of Precedents, are already in the hands of the practitioner, yet a portable volume of short forms, not copied from draughts, but originated with a view to general applicability, and illustrated by succinct statements of the law upon points of frequent occurrence, seemed to be still wanting. This desideratum the authors have endeavoured to supply—with what success the Profession must judge.

A notion has unfortunately obtained, that, while to the preparation of a deed learning and experience are essential, the disposition of a man's property by will may be safely confided to the minimum of legal knowledge. Hence, the conveyancer is rarely consulted, the solicitor is often dispensed with, and the schoolmaster too frequently called in; or, if the schoolmaster be not at hand, there is commonly to be found in every village a will-maker of equal courage and ignorance, the collector or inheritor of exploded forms and phrases. This notion proceeds upon the two-fold error, that wills are expounded not according to the rules of law, but according to the dictates of common sense—and that common sense is the same in all men. The rules of law, when applied (as applied they must be) to wills thus unadvisedly prepared, often defeat the intention, that is, the *probable* intention; but if those rules were discarded for a season, common sense, outraged by the

conflict of opinion, making one poor word, perhaps, the sport of many contrarient decisions, would soon demand their restoration. The general impression, however, that wills are not amenable to the strict rules of legal construction extended its influence to the judicature, and induced a certain laxity of interpretation which confirmed and encouraged the original error. Thus confident ignorance on the one hand, and judicial indulgence on the other, produced and reproduced blunders and obscurities of every shape and shade, which have swelled the mass of adjudication, without advancing the law as a science. But we may observe in some of the later judgments a tendency to establish a wholesome strictness of construction, to discountenance arguments drawn from vague and speculative views of the intention, and, to recur to Lord Coke's "good rule, always to judge in such cases (*i.e.* cases of informal wills) as near as may be, and according to the rules of law." By steadily acting upon this sage advice, by showing that the principles of interpretation applicable to deeds and wills, which (with two or three well-established exceptions) are the same in their institution, are likewise the same in their application, the Profession and the Public would soon be taught that the last important office of providing for the disposal of men's possessions, when death has precluded the possibility of explanation or correction, requires at least the same degree of information and intelligence which is confessedly necessary to the conveyance of a rood of land from a seller to a purchaser. Such an inflexible course of decision would tend to abate, even in professional men, somewhat of that confidence which now prompts them to draw wills without any previous study, relying upon *intention* as the law of the instrument, and the liberal rectifier of all blunders.

There cannot, indeed, be a greater mistake than that of supposing that a very small stock of legal terms, added to a very ordinary education, suffices to accomplish the will-maker. On the contrary, a will is alone capable of exhausting the science and ingenuity of the most able conveyancer. It may embrace every allowable modification of property, every possible scheme of disposition. As it is the duty of the will-maker (at least of the solicitor undertaking that office) not merely to draw, but to advise, he should be conversant as well with the various modes, as with the various forms of gift; prepared alike to suggest the aptest kind of destination, and to effect it by the aptest words. Even of those testators whose wills are prepared under professional advice, it may be safely affirmed, that, while the intentions of not a few are frustrated by failure in point of expression, the intentions of a far greater number are never elicited by presenting to their consideration the arrangements most suitable to their views and circumstances. In a large proportion of cases the nature, as well as the language, of the disposition is determined not by the deliberate choice of the person who makes the gift, exercised over the various modes in which the law allows him to direct the enjoyment of his property after his decease, but by the extent of the knowledge possessed by the person who prepares the instrument, which may therefore be said to exhibit the *mind* of the framer rather than the *will* of the testator.

On the other hand, it must be admitted that the blame of miscarriage is not unfrequently attributable to the testator himself. Want of explicitness or candour in the communication of the actual state of his property or circumstances, or an obstinate attachment to some favourite project, may render abortive the most judicious advice. A short-sighted economy, too, which calculates

the present fee and disregards the ravages of a posthumous Chancery suit, frequently obliges the practitioner to rely upon his own powers when he would willingly avail himself of experienced counsel.

So far as the mischief springs from the loose exposition of testamentary instruments, we have everything to hope from greater firmness in the judicature. So far as unskilful penning is its source, we must look to the increase of knowledge and tact in the practitioner. These it is the object of the following sheets to promote, by furnishing him with some useful suggestions, and guarding him against some not unfrequent errors. With respect to the testator himself, indeed, the evil has its root in human nature; yet, even here, some good may be expected to result from setting before him a few simple and rational forms of disposition, with the consequences of indulgence in complicated schemes and capricious humours.

As an eminent conveyancer has often been heard to declare, that of all the duties which devolved upon his department of the Profession, that of drawing or settling a will is the most thankless and unprofitable; while it is well known that one-half, at least, of the cases laid before counsel arise out of informal wills, the preceding remark must stand above the suspicion of seeking to attract this responsible branch of practice to the chambers of the regular draughtsman. The authors trust, indeed, that their joint labours bear internal evidence of an anxiety to assist in delivering wills from the necessity of frequent resort to counsel or to courts, by putting plain directions into the hands of the general practitioner. They are not, however, vain enough to think that no error has been admitted into the following sheets capable of producing the evil which they deprecate.

*January* 7, 1835.

# CONTENTS.


PAGE

TABLE OF CASES . . . . . xxv

ABBREVIATIONS USED IN CITATION OF REPORTS AND TEXT-BOOKS . . . . . lix

THE WILLS ACT, 1 VICT. C. 26, AND NOTES . . . 1

THE WILLS ACT AMENDMENT ACT, 1852, 15 & 16 VICT. C. 24 . . . . . 82

A PRACTICAL VIEW OF THE WILLS ACT . . . . 87

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR AND PREPARING WILLS . . . . . 121

DIRECTIONS AS TO THE EXECUTION OF A WILL . . . 135

PUNCTUATION . . . . . 136

PRECEDENTS:

1. Will giving to one absolutely all the Testator's Real and Personal Estate . . . . . 138
2. Will disposing of Real and Personal Estate in favour of Testator's Daughter, a Married Woman, for her Separate Use, restrained from Anticipation . . . 142
3. Will disposing of Real and Personal Estate in favour of the Testator's Widow and two Adult Sons, the Widow taking a Legacy, and subject thereto a Life Estate in the Entirety . . . . . 149
4. Will of a Widower, devising his Real Estate to an only Son; bequeathing his Personal Estate to his adult unmarried Daughters, and on the Death or Marriage of all, the Capital to be equally divided amongst all his Daughters and the Children or remoter Issue of deceased Daughters . . . . . 151
5. Will disposing of Real and Personal Estate in favour of two Sons, of whom one is an Adult and the other a Minor.—Direction to purchase a Life Annuity . 157

PRECEDENTS—*continued.* PAGE

6. Will of a Married Man, giving the Income of his Property to his Wife during Widowhood; subject thereto, the Capital equally among his Children, the Children of a deceased Child taking their Parent's Share . . . 170

7. Will of a Married Man, leaving all his Property to Trustees for Sale and Conversion, to pay Debts and Legacies, and to invest the Surplus; Income to Wife during Widowhood, charged with Maintenance of Children; Capital among Children equally at Twenty-one or Marriage.—Settlement of Shares of Daughters.—Provision for Advancement of Children.—Substitution of Grandchildren for Children dying before Testator.—On Failure of Previous Trusts as Wife shall appoint; in Default for Testator's Next of Kin . . . . 175

8. Will of a Married Man, leaving all his Property, after certain Legacies, to Trustees for Conversion, to pay Debts and Legacies, and to invest the Surplus; Income to Wife during Widowhood; Capital among Children equally at Twenty-one or Marriage.—Settlement of Shares of Daughters.—Substitution of Grandchildren for Children dying before Testator.—On failure of previous Trusts, as Wife shall appoint; in Default for Testator's Next of Kin.—Powers [to sell Minerals apart from the Surface,] to postpone Conversion, and in meantime to manage and lease.—Powers of Investment, Advancement, &c. . 182

9. Will of a Married Woman, having no Issue, disposing of Real Estate and a Money Fund, over both of which she has Powers of Appointment, and of her separate Property, in favour of her Husband and collateral Relations.—Appointment of the Real Estate to the Husband for life; to Trustees, for the separate Use of a Married Sister for Life; to the Sister's Husband for Life; to her Issue as she shall appoint; to her Children in Fee, with cross Limitations; to such Persons as she shall appoint; to the Survivor of the Sister and her Husband in Fee.—Appointment of the Money Fund to Trustees to be disposed of as Part of the Residue.—Bequest of Specific Legacies.—Bequest of the Residue to Trustees, to pay pecuniary Legacies and Annuities; Funds to be set apart to answer the Annuities; Ultimate Trust for Brothers and Sisters equally.—Power to appoint New Trustees . 189

PRECEDENTS—*continued.* PAGE

10. Will devising Real Estate to Trustees, upon Trusts for raising Money by Mortgage, in aid of the Personal Estate, to pay Debts and Legacies; and, subject thereto, for the Testator's Son and his Issue, in Strict Settlement; and failing such Issue, for raising certain Sums; and subject thereto, for collateral Relations.—Specific Bequest of Leaseholds for Years, and other specific Legacies.—Bequest of Annuities and pecuniary Legacies.—Power to appoint New Trustees . . . 199

11. Will of a Bachelor, disposing of real estate in favour of collateral Relations.—Specific and Pecuniary Legacies and Life Annuities.—Various Trusts declared of several of the Pecuniary Legacies and Annuities, in favour of Nephews and Nieces and other collateral Relations.—Trust for an Imbecile.—Residue divided among Testator's Brothers and Sisters, and settled on them and their Families; with cross Limitations between the Stocks; and with ultimate Limitations to the Brothers, and to the Appointees and Next of Kin of the Sisters, of their respective original Shares . . . . . 210

12. Will of a Married Man, providing for a Wife and his Son, an only Child.—Bequest of Household Effects to Wife.—Pecuniary Legacy to Testator's Mother for Life, then to his Sister absolutely.—Devise of Real Estates to Wife for Life; Remainder to Son absolutely, with an Executory Devise, on his Death under Age, to Wife absolutely.—Bequest of Residuary Personal Estate to Trustees for Conversion and Investment.—Income to Wife for Life.—Capital to Son, with Executory Bequest, on his Death under Age, to Wife.—Provision for Advancement of Son.—Power to sell Real Estate, and invest the Produce, to be held upon the Trusts of the Personal Estate; to postpone the Conversion of Personal Estate; to appoint Trustees.—Appointment of Executors and Guardians . . . . . 253

13. Will of a Married Man, providing for a Wife and Younger Children by Name; the Eldest Son having been provided for.—Rent-charge to Wife reducible on Marriage.—Residue (Real and Personal) to Younger Children, with Executory Limitations between them and the Eldest Son . . . . . 263

PRECEDENTS—*continued.* PAGE

14. Will of a Married Man, providing for a Wife and Adult Children.—Bequest to Wife of Wines, &c., and the use of Furniture.—Real Estate, and Residue of Personal Estate, vested in Trustees for Sale and Conversion; Income to Wife for Life.—Legacy out of Capital to one Child, and Surplus among the other Children.—Trustees not to sell Real Estate in Wife's Lifetime without her Consent, and to be at liberty to postpone the Conversion of Personalty. —Power to appoint Trustees.—Appointment of Executors 266

15. Will of a Married Man, disposing of Personal Property in favour of his Wife and Children.—Furniture, &c., bequeathed to Wife absolutely; Income of Residue to Wife during Widowhood; Capital to Children and Issue living at her Death or Marriage, *per stirpes;* Husbands and Widows of deceased Children to participate; Advancement.—Directions as to Investment of Residue, with power to continue Investments, and Special Provisions as to what shall be deemed Income.—Power to appoint Trustees, &c. . . . . 270

16. Will of a Widower, disposing of Real and Personal Property in favour of his Children, with ulterior Trusts in favour of other Objects.—Real and Personal Estate vested in Trustees for Sale and Conversion; Produce to be invested, and Fund divided among the Children equally, with provisions for Maintenance and Advancement; but a Moiety of each Child's Share is settled upon Trust for the Child and its Issue.—Power to appoint Trustees.—Appointment of Executors, with Legacies for their Trouble . . . . . 285

17. Will of a Married Man, providing for a Wife and for Adult and Infant Children.—Devise to Wife during Widowhood of Freehold Dwelling-house, with the use of the Furniture, &c., Devise of other Freehold Property to Two Sons in common in Fee, subject to a charge in aid of the Personal Estate.—Devise of other Freehold Property upon Trusts in favour of a Married Daughter for Life inalienably, and her Issue, and ultimately upon the Trusts declared of the Residuary Real Estate.—Residue of Real and Personal Estate vested in Trustees for Conversion into Money, with discretionary Power to postpone Conversion, and Direction as to Unconverted Estate; Produce, subject to a Provision for Wife by way of

PRECEDENTS—*continued.* PAGE

Annuity (reducible on Marriage), given to Children equally; each Child's Share strictly settled on such Child for Life inalienably, and on his or her issue, with Power of appointing a Life Interest to a Husband or Wife—Provisions for Advancement, &c., with an ultimate Limitation over in favour of the other Children and their Issue, &c.—Power to appoint Trustees.—Appointment of Executors and Guardians . . . . . 297

18. Will of a Married Man, disposing of Real and Personal Estate in favour of his Wife and Children.—Devise of Part of the Real Estate to Testator's Children in Fee; of other Part to a Married Daughter and her Husband successively for Life, and her Children in Fee; of other Part to a Son and his Wife successively for Life, and their Children in Fee; of other Part to a Son for Life, then to his Sons successively in Fee, by way of Executory Devise, with a Limitation over to his daughters; of other Part to Testator's Wife during Widowhood, then to Trustees for Sale, with Power to concur with the Wife in a Sale.—Devise of Residue of Freehold and Leasehold Estate to Trustees for Sale.—Copyhold Estates are subjected to the same Dispositions, with Power for Trustees to appoint the same to Purchasers.—Permission to Wife to occupy Dwelling-house, &c., during Widowhood; Specific and Pecuniary Bequests to Wife.—Bequests of Residuary Personal Estate to Trustees to be converted, with particular Powers and Provisions applicable to Contingent and Reversionary Property, Annuities and other determinable Investments.—Produce of Residuary Real and Personal Estate to be invested, and Income paid to Wife during Widowhood; Capital to Children equally, but so as to postpone, as far as may be, the Vesting till Twenty-five.—Ultimate Trust (subject, as to Part, to wife's Appointment) for Testator's Brothers and Sisters, and their Issue, *per stirpes*.—Provision for letting in the Families of Testator's Children dying in his Lifetime.—Settlement of Daughter's Shares upon them and their Issue; with a special Provision for their Protection, and a Power to appoint Life Interests to Husbands.—Provisions for Advancement of Infant Legatees generally.—Annuity to Wife marrying again.—Power to appoint Trustees.—Appointment of Executors and Guardians . 305

PRECEDENTS—*continued.* PAGE

19. Will of a Tradesman bequeathing his Business to his Widow, and appointing her sole Trade Executrix.—Residue to Trustees to convert and invest; Income to Wife during her Life; subject thereto, Capital to Children equally; the Issue of Deceased Children taking their Parent's Share . . . . . 335

20. Will of a Trader; Direction to Wife to carry on Business.—Trustees empowered to discontinue or carry it on in certain events, with provision for their remuneration while they carry it on.—Option to eldest, and, if he declines, then to other Sons successively on attaining Twenty-one to take over Business.—Profits while Wife or Trustees carry on to form part of Testator's Residuary Estate.—Real and Residue of Personal Estate to Trustees to convert and invest.—Income thereof to Wife during Widowhood charged with Maintenance of Children.—On her Death or Marriage Capital to Children equally who attain Twenty-one.—If no Children or Issue attain Twenty-one, to Testator's Brother.—Power of Advancement.—Power to appoint Trustees . . . . . 337

21. Will of a Trader carrying on business alone and having an Infant Son and Daughters.—Appointment of Executors and Trustees.—Direction to Wife to carry on Business.—Option to Son of being employed in the Business at a Salary on attaining his Majority; and to take over Business on attaining Twenty-five years.—Son then to pay Sum into Residuary Estate.—Power to Trustees to carry on Business on Death or Refusal of Wife.—Application of Profits: (1) while Wife carries on (*a*) whole to her till Son Twenty-one, (*b*) then between Wife and Son till latter Twenty-five; (2) while Trustees carry on (*a*) Remuneration to them, (*b*) Balance while Wife alive as in (1), but on Wife's Death (*a*) to form Part of Residue till Son Twenty-one, (*b*) then till Son Twenty-five, Part to fall into Residue and Part to Son.—Power to Wife and Trustees to sell the Business in certain events.—Application of Proceeds of Sale: Part to fall into Residue, Part to Son if he attains Twenty-one.—Wife entitled to Business, subject to certain Payments, on Son's refusal of it at Twenty-five.—On Purchase by Wife, Purchase-money to belong partly to Son, partly to Residue.—Residue of Real and Personal Estate on Trust for Sale, Conversion,

PRECEDENTS—*continued.* PAGE

Payment of Debts, and Investment.—Income to Wife for Life, she maintaining Children.—Then Capital to Children.—Son not to Share if he has Business, but otherwise may do so on Conditions.—Advancement of Children.—Power to Wife to appoint New Trustees . 341

22. Will of a Trader carrying on business alone and having two Infant Sons and also Daughters.—Appointment of Trade Executors and Substitution of others on Death, &c., of those first appointed.—Sons to become Trade Executors no attaining their Majority.—Bequest of Business to Trade Executors on Trust to carry it on until Sons attain Majority or Die before then, being the Time of Distribution.—Application of Profits of Business by Trade Executors: (1) Remuneration for carrying it on; (2) Annuity to Wife; (3) Investment and Accumulation of Remainder.—Power to resort to Investments of Profits if further Capital required, or in case of Deficiency of Profits in any year.—If not resorted to, to become Part of Residuary Estate.—Trade Executors to offer Business when Sons attain their Majority (1) to Sons jointly; (2) to Elder Son; (3) to Younger Son; (4) in case Offers refused, Business to be Sold and for this purpose Trade Executors may form Limited Liability Company.—Means provided for Forming and Bringing out a Company.—Immunity of Trade Executors if Company prove Abortive.—Moneys arising from Sale of Business to form part of Residuary Estate.—Exemption of Legacies from Duty.—Bequest of Plate, Furniture, &c., to Wife absolutely.—Devise and Bequest of Real and Residue of Personal Estate to Trustees on Trust to Sell and Convert, and to pay Debts, &c., and Legacies, and to invest Remainder to form an Aggregate Fund.—Annuity out of Fund to Wife for Life, Balance for Children and Issue of Testator living at time of Distribution, and, if none, to Legatees named who take Vested Interests at Testator's Death.—Provision for Advancement of Testator's Children and Issue.—Appointment of Executors and Trustees, and Bequest to such of them as act.—Revocation of prior Wills, and Appointment of Guardians of Testator's Children . . . . . 347

23. Will of a Trader, disposing of Real and Personal Estate in favour of his Wife and Children.—Property vested in

PRECEDENTS—*continued.* PAGE

Trustees, with Directions to sell the Real Estate and to carry on Trade.—Wife during Widowhood to have the Use and Occupation of Testator's House and Furniture, and to receive the Income of the Trust Estate, maintaining and bringing up the Children.—Portions to be raised for Children requiring Advancement during her Widowhood.—On her Death or Marriage, the Capital to be distributed among the Children.—Directions for Advancement.—Powers to employ Accountants, &c.; to appoint Trustees.—Appointment of Executors and Guardians . . . . . 354

24. Will of a Trader, disposing of Real and Personal Estate in favour of his Wife and Children.—Specific Bequests to Wife of Wearing Apparel, Wines, &c.—Bequest of Railway Shares.—Pecuniary Legacies to Trustees, to Invest and pay Income to Wife for Life, Capital for Children as she shall by Will appoint; in Default of Appointment, to fall into Residue.—Real Estate and Residuary Personal Estate to Trustees; to permit Wife to carry on Trade, and to occupy and use the Testator's Dwelling-house, Furniture, &c., while any Son shall be under Age or Daughter under Age and unmarried, with Discretionary Power for the Trustees after her Death or Marriage to carry on, or permit her to carry on, the Trade; eventually to sell or convert, and to divide the Produce among all the Children.—Real and Personal Estate to be valued.—Powers to maintain the Children after the Death or Marriage of the Wife out of the general Income; to advance Children part of their Shares of Valuation; to raise Money by Mortgage, &c.—Option to Sons in Succession to purchase Real Estates.—Powers to settle Partnership Concerns, and appoint Trustees.—Special exemption of Trustees from Responsibility for the Receipts and Acts of each other.—Appointment of Executors and Guardians 361

25. Will of a Trader engaged in Trade in Partnership as a Builder, &c., providing for a Wife and Children.—Real and Personal Estates vested in Trustees for Sale and Conversion, with a Power to raise Money by Mortgage of the Real Estate.—Income to be applied in Payment of an Annuity to Wife during Widowhood for the Support of herself and Children; a reduced Annuity for Wife on second Marriage; after her Death or Marriage, Annual

PRECEDENTS—*continued.* PAGE

Allowances for Maintenance of Children; Surplus to accumulate till Youngest Child attains Twenty-one.—Capital and Accumulations to Testator's Children and remoter Issue living at the Determination of the Trust for Accumulation, *per stirpes;* if none, for Testator's Brothers and Sisters.—Powers to Trustees to advance Testator's Children before the period of Distribution; also remoter Issue; to purchase Land, take Building Leases, let Furnished Lodging-houses; to make Allotments of Real Estate to Objects entitled in Distribution.—Provisions relating to Testator's Trade.—Right of Preemption given to Testator's Partner as to Share of Partnership Business.—Powers to settle Accounts, sell Stock, &c., lend Money to Testator's Son on Bond.—Appointment of Executors and Guardians . . . 379

26. Will of a Farmer, disposing of his Personal Property in favour of his Wife and Infant Children.—Legacies to Children at Twenty-one or Marriage.—The Wife to be sole Trustee and Executor during Widowhood; with large discretionary Powers to carry on the Farming Business, and manage the Estate generally.—Wife marrying to have an Annuity; on her Death or Marriage, the Property is vested in Trustees for the benefit of the Children . . . . . 399

27. Will of a Landed Proprietor, devising his Real Estate in Settlement and adopting the Provisions of the Settled Land Act, 1882.—Bequest of Residuary Personal Estate to be applied for the purposes authorised by that Act . 406

28. Will of a large Landed Proprietor.—Charge of Annuities.—Additional jointure Rent-charge for Wife.—Term for raising Money in aid of Personal Estate to pay Debts and Legacies.—Terms for raising Portions for Testator's Younger Children.—Limitations in Strict Settlement to the Testator's Issue, with Remainders to his collateral Relations.—Powers to Tenants for Life to charge with Jointures; to limit Life Estates to Husbands; to charge with Portions for younger Children.—Appointment of Trustees to Manage, and for purposes of Settled Land Acts during Minorities.—Clause enjoining the Use of Testator's Name and Arms.—Devise of Copyhold and Leasehold Estates upon corresponding Trusts.—Plate, &c., to be enjoyed as Heirlooms.—Bequest of Carriages,

PRECEDENTS—*continued.* PAGE

&c., to Wife.—Direction to keep up Testator's Establishment for a short Period.—Bequest of the Residue of Personal Estate to Trustees for Investment in Land, to be settled to the Uses of the devised Estate.—Provision for changing Trustees.—Appointment of Executors and Guardians.—One of the Trustees, a Solicitor, to be entitled to Professional Charges . . . . . 408

29. Will devising Real Estates to the Uses of a Settlement made upon the Testator's Marriage . . . . . 431

30. Codicil, revoking the Appointment of Two or Three Trustees and Executors, and substituting others . . 432

31. Codicil, appointing a Trustee and Executor in the place of one deceased . . . . . 440

## MISCELLANEOUS FORMS.

Commencement of wills . . . . . 442

Appointment of executors and trustees . . . . 443 *et seq.*

legacies to them . . . 444

guardians and trustees . . 444

conditional on son attaining twenty-one . . . . 444

wife during widowhood . . . 445

special . . . . . 445

as to trade . . . . . 445

in respect of a debt . . . 445

to continue representation of prior testator . . . . . 445

of mortgage debt specifically bequeathed . . . . . 446

as to leaseholds specifically bequeathed . . . . . 446

of building land specifically bequeathed . . . . . 446

Post-mortem examination . . . . . 447

Directions as to funeral . . . . . 448

burning corpse . . . . . 448

Provision against lapse . . . . . 448

Pecuniary legacies . . . . . 448

to trustees upon trusts after declared . 448

payable at end of five years or sooner at discretion of executors . . . . 448

MISCELLANEOUS FORMS—*continued.* PAGE

Pecuniary legacies to wife for immediate use . . . . 449
to trustees and executors . . . . 449
to servants . . . . . 449
direction as to time of payment . . 449
to charities . . . . . 452
to church trustees . . . . . 452
to trustees, to carry interest, upon trust for younger children, *nominatim;* on death of any son under twenty-one; or on becoming eldest son; or on death of any daughter under twenty-one; out of the share of the children so dying, £1,000 to be added to the share of each of the other younger children and the balance to fall into the residue . . 453

Life annuities . . . . . 453 *et seq.*
direction as to payment . . . . . 453
appropriation of funds to answer 453
exoneration of residue . . 454
to servant until alienation . . . . 454
power to accept bond of residuary legatee as security . . . . . 454
trust to sink part of residue in a life annuity to be paid to the *cestui que vie* till bankruptcy or alienation . . . . . 454

Charge of legacy on specific real estate with provision for discharge thereof . . . . . 456

Corpus of estate at wife's disposal, in default of her for life, with gift over . . . . . 457

Payment through banker of married woman's separate income 458

Bequest of trinkets to wife absolutely, plate and trinkets as heirlooms . . . . . 458
household furniture, &c., for use of wife; inventory thereof being taken; power to executors to determine extent of bequest . . . 458
wearing apparel, &c., as executors think fit . . 459
furniture to wife at a valuation . . . . 459
to trustees upon trust for wife for life; to sell and divide proceeds amongst children; proviso allowing division in specie . . . . . 460

MISCELLANEOUS FORMS—*continued.* PAGE

Bequest of furniture to trustees for unmarried children equally, with survivorship . . . . . 460
specific legacies . . . . . 461
direction as to time of delivery . 461
legacy duty to be paid out of residue . . . . . 461

Release of mortgage debt conditionally on debtor settling mortgaged lands, and in default, direction to executors to recover debt and therewith purchase lands to be settled . 461

Bequest to wife on condition that she gives a bond to executors to pay £—— within six months after her death . . . 462

Bequest to debtor of mortgage debt . . . . . 462

Forgiveness of debt . . . . . 462

Bequest of shares; direction as to calls . . . . . 463
stock, and direction to purchase in case testator should not have any . . . . . 463
shares; direction against apportionment . . . 464
solicitor's books, drafts, and papers . . . . 464
share in brewery . . . . . 464
partnership concern; to be valued . . 465
money to trustees to invest; pay income to legatee until bankruptcy; then to maintain his children; if none, gift over . . . . . 465
money to trustees to invest; pay income to niece for life, restrained from anticipation; then to children equally; if none, to fall into residue . 466

Appointment of trust funds in execution of a power contained in a former will . . . . . 466

Appointment to children . . . . . 467

Devise to children in fee, with cross-executory limitations in fee 468

Devise specifically of freeholds and leaseholds to trustees, subject to a charge, upon trust for issue of son as he appoints, and in default of son for life, then to his children at majority, or marriage; hotchpot . . . . . 468

Bequest of leaseholds and personalty to first son, &c., entitled to the possession of settled freehold estate. . . . . 469

Devise of real estate to trustees; to permit wife to occupy house during widowhood; to let and manage during minority of son; for maintenance of son; then to son in fee . . 470

Devises to uses in strict settlement . . . . . 471

MISCELLANEOUS FORMS—*continued.* PAGE

Equitable limitations to a son in being and every after-born son of testator for life, with legal remainders to the heirs in tail of each such son, and a proviso determining the life interest on bankruptcy or alienation . . . . . 472

for life; remainder to first and other sons of life tenant born in testator's lifetime for life; remainder to such sons' first and other sons in tail male; remainder to first tenant for life in tail; reversion to testator's right heirs; [with variation substituting a term of years determinable on life, for the life estate] . . . . . 473

to husband and wife; remainder to their children as they or the survivor shall appoint; in default to the children in common in fee, with cross-executory limitations; with an ultimate limitation to the surviving parent in fee . . . . . 473

to children in common in fee . . 475

to sons and daughters successively in fee simple by way of executory use . 475

to children and issue *per stirpes* in fee . 476

Devise in fee; in case of death to sons successively in fee; charged with a sum for brothers and sisters . . 476

to uses by reference . . . . . 477

of advowsons . . . . . 477

testator being both patron and vicar, to trustees on trust to present an aged clerk; then to sell . . . . . 478

to trustees to present testator's son, if qualified; if not, to present a clerk, taking bond of resignation in favour of son; when son is inducted to convey to him. If son shall not accept, to sell . 479

to trustees to sell; power to postpone sale to present a son of testator; elder son preferred; power to sell to son; value of presentation to be brought into account by son . . . . 480

MISCELLANEOUS FORMS—*continued.* PAGE

Appointment of protectors of estate tail; power to appoint new protectors . . . . . 481

Devise of land contracted to be sold . . . . . 482
substituting gift of money if testator sells land 483
contracted to be purchased . . . . . 484
to children as parents appoint; in default, as survivor appoints; in default to children equally; accruer, on death of children without issue, in favour of the others; executory gift over . . . . . 484

Right of pre-emption to several sons successively . . . 485

Devise of two messuages to trustees to offer one to testator's first and second sons, and the other to the same sons, reversing their order, in succession, and if they decline, then to sell . . . . . 486

Real and leasehold estates to son subject to debts and legacies, and to a prior life interest in part . . . . . 487

Real and residue of personal estate to trustees to sell and convert; power to sell minerals apart from surface; to postpone conversion; interim management; constructive conversion from death; rents, &c., to be deemed income. Trusts of proceeds; to pay expenses, debts, legacies and annuities; to invest ultimate surplus and pay income to wife during widowhood charged with maintenance, &c., of children; on her death or marriage, capital to children equally. Settlement of daughters' shares; daughters empowered to appoint life interests to husbands. Advancement of testator's children and issue irrespective of minority. Substitution of grandchildren for children of testator predeceasing him. On failure of previous trusts, as testator's wife shall by will appoint; in default, for testator's next of kin . . 487

Residuary devise and bequest to trustees to pay debts, &c., to repair and complete buildings; to pay legacy and succession duties, and costs; to pay wife annuity reducible on marriage; subject as aforesaid, on trust for children of testator in unequal shares; power to postpone division; to advance gross sum out of expectant share to sons after attaining vested interests . . . . . 494

Heirlooms; exonerated from testator's debts, but subject to executory limitation over . . . . 496

MISCELLANEOUS FORMS—*continued.* PAGE

Heirlooms; personal chattels settled as, where there is no real estate; with executory limitation over on death under twenty-one of tenant in tail by purchase 497

Trust fund for children and for the issue *per stirpes* of such children by substitution . . . . . 498

Residuary personal estate or accumulated fund on trust by reference . . . . . 498

Name and arms clause; gift over in default of compliance . 498

Shifting clause . . . . . 499

Power to trustees to lease real estate, subject to wife's right to occupy part. Annual income of real and personal estate till sale, and of trade, to be applied in the same way as income of trust fund . . . . . 500

Power to trustees to lend money to builders . . . . 501
to mortgage or sell for enfranchising copyholds, or purchasing fee of leaseholds . 501
to develop building land . . . . 501
as to mortgages and costs of transfer . 502

Deferred annuities to nephews subject to prior limitations and annuity . . . . . 502

Power to trustees to postpone sale of policies of assurance . 503
maintain, educate, and advance children 503
advance children with wife's consent . 504
determine value of share of each beneficiary . . . . . 504
appropriate towards shares . . . 505
maintain children by percentage on portions . . . . . 505

Hotchpot . . . . . 505

Investment of trust moneys . . . . . 505

Marriage to be with consent of parents or guardians . . 506

Constructive conversion . . . . . 506

Provision in satisfaction of wife's jointure . . . . 507

Accruing shares subjected to trusts by reference . . . 507

Conversion of hazardous investment, powers to trustees as to 507

General powers of management to trustees . . . . 507

Condition not to dispute will . . . . . 508

MISCELLANEOUS FORMS—*continued.* PAGE

Locke King's Act excluded . . . . . 509

Apportionment of rents, &c., current at death negatived . 509

Mutual wills . . . . . 510

Testimonium clauses . . . . . 512
will on one sheet of paper . . . 512
several sheets . . . . 512
executed in duplicate . . . . 512
acknowledged by testator . . . 512
amanuensis . . 512

Attestation clauses . . . . . 513
in case of signature by testator to will . 513
acknowledged . . 513
by amanuensis . . 513

Memorandum of alterations, on same paper as will . . 514
in margin . . . . . 514
and interlineations and re-execution . . . . . 514

Revocation of wills . . . . . 515

Revival on separate paper of will revoked by marriage . . 515
same paper, of will . . . . . 515

Codicil made after marriage, reviving will subject to provision for wife and children . . . . 516
death of son . . . . . 516

APPENDIX :

I. The statute 12 Car. II. c. 24, as to Guardianship . 517
II. On Domicile . . . . . 519
III. On a Testamentary Charge of Debts . . . . 535
IV. Depository for Wills of Living Persons . . . 543

INDEX . . . . . 547

# TABLE OF CASES.


A

PAGE

ABADAM *v.* Abadam ..... 196
Abbey, *In b.* ..... 50
Abbiss *v.* Burney ..... 248, 325
Abbott, *In re* ..... 329
Abd-Ul-Messih *v.* Farra ..... 519
Abraham *v.* Joseph ..... 45
Acherley *v.* Vernon ..... 119
Ackroyd *v.* Smithson ..... 208
Adams, *In b.* ..... 11
—— and the Kensington Vestry, *Re* ..... 225
—— *v.* Adams (L. R. 14 Eq. 246) ..... 322
—— *v.* Adams ('92, 1 Ch. 369) ..... 456
—— *v.* Lavender ..... 274
Addams *v.* Ferick ..... 368
Addecott *v.* Addecott ..... 195
Adkins, *In re* ..... 234
Adshead *v.* Willetts ..... 162
Adv.-Gen. *v.* Grant ..... 528
Aikman *v.* Aikman ..... 529
Ainsworth, *In b.* ..... 84
Aird's Estate, *In re* ..... 403
Airey *v.* Bower ..... 67
Aislabie *v.* Rice ..... 393, 424
Aitchison *v.* Dixon ..... 525
Aiton *v.* Brooks ..... 293
Akerman, *In re* ..... 463
Akeroyd's Settlement, *Re* ..... 455
Alcock *v.* Sloper ..... 282
Alexander, *In b.* ..... 526
Aleyn *v.* Belchier ..... 467
Alford, *In re* ..... 181
Alger *v.* Parrott ..... 228
Allan, *In re* ..... 113, 209, 436
—— *v.* Morrison ..... 46
Allardice *v.* Onslow ..... 529
Allen, *In b.* ..... 21
—— *In re* ..... 375
—— *v.* Allen ..... 203
—— *v.* Callow ..... 249
—— *v.* Coster ..... 258
—— *v.* Jackson ..... 394

PAGE

Allen *v.* M'Pherson ..... 13
—— *v.* Maddock ..... 16, 434
—— *v.* Webster ..... 238
Allnutt, *In b.* ..... 434
—— *In re* ..... 456
Almack *v.* Horn ..... 249
Almosnino, *In b.* ..... 434
Alston, *In b.* ..... 511
Alt *v.* Gregory ..... 436
Ames, *In re* ..... 359
—— *v.* Cadogan ..... 70
Amherst's Trusts, *Re* ..... 455
Amiss, *In b.* ..... 26
Amos, *In re* ..... 230
Amphlett *v.* Parke ..... 208
Amyot *v.* Dwarris ..... 58
Ancaster *v.* Mayer ..... 292
Ancona *v.* Waddell ..... 455
Anderson *v.* Anderson ..... 37
—— *v.* Berkeley ..... 451
—— *v.* Laneuville ..... 525
Andrew *v.* Andrew 386, 392, 395
—— *v.* Motley ..... 42
Andrews *v.* Partington ..... 246
Andros, *In re* ..... 530
Angermann *v.* Ford ..... 231
Angerstein, *Re* ..... 429
—— *v.* Martin ..... 280
Anon., *In re* ..... 260
Anstee, *In b.* ..... 83, 85
Anthony, *In re* ..... 292
Aplin *v.* Stone ..... 37
Applebee, *In re* ..... 445
Appleby, *In re* ..... 334
Appleton, *In re* ..... 232
Archer, *In b.* ..... 84
Arden *v.* Goodacre ..... 196
Argent *v.* Argent ..... 530
Armitage *v.* Coates ..... 326
Armstrong's Trusts, *Re* ..... 369
—— *v.* Armstrong ..... 419
—— *v.* Burnet ..... 368
—— *v.* Clavering ..... 232
Arnold's Trusts, *In re* ..... 295
—— *v.* Arnold ..... 166

PAGE
Arnold *v.* Chapman ..... 207
—— *v.* Congreve ..... 327
—— *v.* Preston ..... 238
Arrowsmith's Trusts, *Re* ... 427
Arthur, *In b.* ..... 85
Ash, *In b.* ..... 17
Ashburner *v.* Macguire ..... 260
Asher *v.* Whitlock ..... 3
Ashforth's Trusts, *In re* ..... 331
Ashley *v.* Ashley ..... 330
Ashmore, *In b.* ..... 22, 26
Ashton *v.* Horsfield ..... 437
Ashwell *v.* Lomi ..... 98
Askew *v.* Askew ..... 295
—— *v.* Thompson ..... 258
Astell, *In b.* ..... 18
Asten *v.* Asten ..... 161
Astley *v.* Essex ..... 422
—— *v.* Micklethwait ... 169, 248
Aston, *In b.* ..... 235
—— *v.* Aston ..... 392
Astor, *In b.* ..... 18
Atherton *v.* Crowther ..... 226
Atkinson, *In b.* ..... 439
—— *v.* Littlewood ..... 274
—— *v.* Morris ..... 46, 49
—— *v.* Webb ..... 275
Attenborough *v.* Attenborough 328
Att.-Gen. *v.* Baxter ..... 374
—— *v.* Cock ..... 374
—— *v.* Davies ..... 370
—— *v.* Dimond ..... 528
—— *v.* Fitzgerald ... 525, 528
—— *v.* Fletcher ..... 224
—— *v.* Gladstone ..... 374
—— *v.* Kent ..... 442, 523
—— *v.* Lawes ..... 374
—— *v.* Lomas ..... 269
—— *v.* Malkin ..... 228
—— *v.* Munby ..... 371
—— *v.* Napier ..... 528
—— *v.* Parsons ..... 371
—— *v.* Pottinger ... 442, 522
—— *v.* Pouldon ..... 389
—— *v.* Rowe ..... 522
—— *v.* Wahlstatt ..... 524
—— *v.* Williams ..... 370
—— *v.* Wyndham ..... 56
Attree *v.* Attree ..... 161, 167
Attridge, *In b.* ..... 25
Attwater *v.* Attwater ..... 241
Audsley *v.* Horn ..... 475
Austen, *In b.* ..... 31
—— *v.* Graham ..... 95
—— *v.* Taylor ..... 396
Austin *v.* Mead ..... 118
Avern *v.* Lloyd ..... 331
PAGE
Avison *v.* Simpson ..... 229
Axford, *In b.* ..... 20
Ayles' Trust, *In re* ..... 235
Ayling, *In b.* ..... 21
Aynsworth *v.* Pratchett ...258, 259

B.

Bacon, *In b.* ..... 11, 17
Bacon's Settlement Trusts, *In re* ..... 494
Bacon's Will, *In re* ..... 227
Badeley *v.* Lyte ..... 140
Baden *v.* Bassett ..... 63
Badger *v.* Gregory ..... 294
Badham *v.* Mee ..... 358
Baggett *v.* Meux ..... 242
Bagley *v.* Mollard ..... 235, 238
Bagot, *In re* ..... 452
—— *v.* Bagot ..... 193
—— *v.* Legge ..... 500
Bagster *v.* Fackerell ..... 269
Bailey, *In b.* ..... 21
—— *In re* ..... 538
Baily, *In b.* ..... 443
Bain *v.* Lescher ..... 249
Bainbrigge *v.* Blair ..... 359
Baines *v.* Ottey ..... 227, 229
Baker, *In re* ..... 455
—— *v.* Baker ..... 195
—— *v.* Batt ..... 19, 97
—— *v.* Bayldon ..... 119
—— *v.* Bradley ..... 243
—— *v.* Dening ..... 20
—— *v.* Hall ..... 207
—— *v.* Sebright ..... 193
Baldwin, *In b.* ..... 18
Ball's Trusts, *In re* ..... 318
—— *v.* Harris ..... 537, 540
Ballance, *In re* ..... 209
Balme, *In b.* ..... 18
Bangham, *In b.* ..... 17
Bankes *v.* Le Despencer ..... 482
Banks *v.* Braithwaite ..... 193, 252
—— *v.* Denshire ..... 136
—— *v.* Goodfellow ..... 94
Bannatyne *v.* Bannatyne ... 96
Bannerman *v.* Young ..... 197
Barber, *In b.* ..... 48
—— *In re* ..... 359, 360
—— *v.* Barber ..... 231
—— *v.* Wood ..... 162
Barclay *v.* Maskelyne ..... 435
Barfield, *In re* ..... 465
Barker, *In re* ..... 326
—— 's Estate, *In re* ... 209, 436

| | PAGE |
|---|---|
| Barker *v.* Goodair | 260 |
| —— *v.* Lea | 295 |
| Barksdale *v.* Gilliat | 251 |
| Barkshire *v.* Grubb | 159 |
| Barkworth *v.* Barkworth | 73 |
| —— *v.* Young | 79 |
| Barlow *v.* Salter | 294 |
| Barnaby *v.* Tassell | 233 |
| Barnardiston *v.* Fane | 425 |
| Barnes, *In b.* | 446 |
| —— *v.* Crowe | 59 |
| —— *v.* Patch | 205 |
| —— *v.* Rowley | 167 |
| Barnett *v.* Tugwell | 511 |
| Barnwell *v.* Iremonger | 289 |
| Barret *v.* Beckford | 274 |
| Barretto *v.* Young | 527 |
| Barrington *v.* Hereford | 207 |
| —— *v.* Liddell | 390 |
| Barrs *v.* Fewkes | 227 |
| Barry *v.* Butlin | 19, 97 |
| —— *v.* Harding | 235 |
| Bartleman *v.* Murchison | 246 |
| Barton's Trust, *Re* | 369 |
| —— *v.* Barton | 423 |
| —— *v.* Briscoe | 243 |
| Bassil *v.* Lister | 391 |
| Bastard *v.* Proby | 396 |
| Bate, *Ex parte* | 73 |
| Bateman *v.* Hotchkin | 390 |
| —— *v.* Pennington | 11 |
| Bates *v.* Mackinley | 368 |
| Bathurst *v.* Errington | 500 |
| Battersbee, *In b.* | 18 |
| Battyll *v.* Lyles | 46 |
| Baudains *v.* Richardson | 97 |
| Bawden, *Re* | 457 |
| Baxter, *In b.* | 9 |
| Bayard *v.* Smith | 296 |
| Bayley *v.* Bishop | 167 |
| Baylis, *In b.* | 443 |
| Bayliss *v.* Sayer | 25, 26 |
| Bayne, *In b.* | 92 |
| Beach *v.* Clarke | 25 |
| Beadon, *In b.* | 83 |
| Beak *v.* Beak | 118 |
| Beal *v.* Shepherd | 159 |
| Bean *v.* Griffiths | 396 |
| Beard, *In re* | 422 |
| Beardsley *v.* Lacey | 45 |
| Beasney's Trusts, *Re* | 512 |
| Beaumont, *In re* | 521 |
| —— *v.* Fell | 450 |
| Beavan, *In b.* | 50 |
| Bebb *v.* Penoyre | 167 |
| Beckett *v.* Howe | 23 |
| Beckford *v.* Tobin | 260 |
| Beckton *v.* Barton | 402 |
| Bective *v.* Hodgson | 169 |
| Bedford *v.* Abercorn | 397 |
| Bedson's Trusts, *Re* | 240, 246 |
| Beech *v.* St. Vincent | 391 |
| Beetson, *In b.* | 433 |
| Belbin *v.* Skeats | 28 |
| Bell *v.* Coleman | 402 |
| —— *v.* Fothergill | 43 |
| —— *v.* Holtby | 482 |
| —— *v.* Kennedy | 524 |
| Bellairs *v.* Bellairs | 392 |
| Bellasis *v.* Ermine | 392 |
| Bence, *In re* | 325 |
| Bengough *v.* Edridge | 120 |
| —— *v.* Walker | 277 |
| Benn, *In re* | 294 |
| —— *v.* Dixon | 282 |
| Bennett *v.* Bennett | 441 |
| —— *v.* Sharp | 25 |
| Benson *v.* Benson | 45 |
| —— *v.* Maude | 193 |
| Bensusan *v.* Nehemias | 274 |
| Bent *v.* Cullen | 194 |
| Bentham, *In re* | 284 |
| Bentinck *v.* Portland | 327 |
| Berkeley *v.* Swinburne | 321 |
| Bernard *v.* Minshull | 63, 68, 225 |
| Berry *v.* Berry (7 Ch. D. 657) | 76, 248 |
| —— *v.* —— (3 Gif. 134) | 203 |
| —— *v.* Fisher | 397 |
| Bertie *v.* Falkland | 394 |
| Besant *v.* Cox | 320 |
| Best, *In re* | 374 |
| —— *v.* Standeven | 65 |
| —— *v.* Stonehewer | 230 |
| Bethell *v.* Abraham | 119 |
| Bethune *v.* Kennedy | 283 |
| Betts *v.* Doughty | 98 |
| Bevan *v.* Waterhouse | 368 |
| Beynon, *In b.* | 511 |
| Bianchi, *In b.* | 526 |
| Bickley *v.* Bickley | 160 |
| Biddle *v.* Perkins | 333 |
| Biddles *v.* Biddles | 434 |
| Biddulph *v.* Lees | 500 |
| Bide *v.* Harrison | 235 |
| Bigge, *In re* | 195 |
| —— *v.* Bigge | 43 |
| Bignold, *In re* | 256 |
| Bilham, *In re* | 294 |
| Billson *v.* Crofts | 455 |
| Bindon *v.* Suffolk | 296 |
| Birch, *In re* | 291 |
| —— *v.* Birch | 11, 15, 49 |
| —— *v.* Sherratt | 195 |

PAGE

Bird *v.* Harris ..... 227
Birkett, *Re* ..... 373
Birks, *In re* ..... 206
Birt, *In b.* ..... 48
Birtwhistle *v.* Vardill ..... 530
Bishop, *In b.* ..... 512
—— *v.* Curtis ..... 3
Black *v.* Jobling ..... 45
Blackborn *v.* Edgley ..... 162
Blackburn, *In re* ..... 60, 437
Blackman *v.* Fysh ..... 455
Blackwell, *In b.* ..... 443
—— *v.* Bull ..... 205
—— *v.* Pennant ..... 232
Blagrove *v.* Bradshaw ..... 420
—— *v.* Coore ..... 318
Blair, *In b.* ..... 21
Blake's Trusts, *In re* ..... 450
—— *v.* Blake (15 Ch. D. 481) 56
—— *v.* —— (7 P. D. 102) ... 23
—— *v.* Knight ..... 22, 23, 24, 25
—— *v.* Peters ..... 192
—— *v.* Shaw ..... 465
Bland *v.* Wilkins ..... 207
Blandy *v.* Widmore ..... 278, 279
Blann *v.* Bell ..... 72
Blasson *v.* Blasson ..... 250
Bleckley, *In b.* ..... 45
Blew, *In re* ..... 324
Blewitt, *In b.* ..... 26, 51
—— *v.* Roberts ..... 193
Blight *v.* Hartnoll ..... 168, 327
Blithman, *Re* ..... 455
Blower's Trusts, *In re* ..... 204
—— *v.* Morret ..... 274
Bloxam *v.* Favre ..... 3, 531
Blundell, *In re* ..... 277
—— 's Trusts, *Re* ..... 374
—— *v.* Gladstone ..... 166, 450
Boards, *Re* ..... 457
Boddington, *In re* ..... 395
Boden, *In re* ..... 195
Bodenham *v.* Pritchard ..... 164
Bodman, *In re* ..... 368
Boehm, *In b.* ..... 13
Bolton, *In re* ..... 237
Bond, *In re* ..... 225
Bone *v.* Cook ..... 320
Bonner, *In re* ..... 204
Booker *v.* Allen ..... 436
Booth, *Re* ('94, 2 Ch. 282) ... 358
—— *In re* ('00, 1 Ch. 768) 73
—— *v.* Coulton ..... 195
—— *v.* Dean ..... 232
—— *v.* Vicars ..... 376
Bosanquet, *In b.* ..... 17, 22
Bothamley *v.* Sherson ..... 62

PAGE

Boughton *v.* Boughton ..... 389
—— *v.* James ..... 389
—— *v.* Knight ..... 88, 94
Boulcott *v.* Boulcott ..... 53, 113
Bourne *v.* Buckton ..... 391
Bouverie *v.* Bouverie ..... 250
Bowden *v.* Henderson ..... 511
—— *v.* Laing ..... 259
Bowen, *In re* ('92, 2 Ch. 291) ..... 139
—— *Re* ('93, 2 Ch. 491) ... 373
—— *v.* Barlow ..... 61
Bowers *v.* Bowers ..... 320
Bowlby, *In re* ..... 180
Bowles' Case ..... 193
—— *In re* ..... 327
Bowman, *In re* ..... 294
Bown, *In re* ..... 242
Box, *Re* ..... 368
Boyce *v.* Hanning ..... 333
Boyd, *Re* ..... 63
—— *v.* Boyd ..... 477
Boyes *v.* Bedale ..... 530
—— *v.* Cook ..... 67
Boys *v.* Boys ..... 281
Boyse *v.* Rossborough ..... 96, 97
Brace, *In re* ..... 71
Brackenbury *v.* Gibbons ..... 247
Braddock, *In b.* ..... 28
Bradford *v.* Young ..... 527
Bradley, *In b.* (8 P. D. 215) 16
—— —— (5 No. Cas. 95) 51
—— *v.* Peixoto ..... 241, 423
Bradshaw *v.* Bradshaw ..... 262
Brake, *In b.* ..... 443, 451
Brandon *v.* Robinson ..... 240
Brassington, *In b.* ..... 43
Breed's Will, *In re* ..... 180
Bremer *v.* Freeman ..... 520, 526
Brenchley *v.* Lynn ..... 433
—— *v.* Still ..... 25, 26, 433
Brennan *v.* Moran ..... 438
Breton *v.* Mockett ..... 387
Brettle, *In re* ..... 243
Brewis, *In b.* ..... 16, 18
Brewster, *In b.* ..... 42
—— *v.* Angell ..... 397
Brice *v.* Stokes ..... 377
Brickenden *v.* Williams ..... 68
Bricker *v.* Whatley ..... 206
Bridge *v.* Abbot ..... 227, 229
Bridger, *In b.* ..... 139
—— *In re* ..... 370
Bridges *v.* Strachan ..... 437
Bridgnorth (Corporation of) *v.* Collins ..... 205
Briesemann, *In b.* ..... 527

| | PAGE |
|---|---|
| Briggs *v.* Penny | 225 |
| Bright *v.* Larcher | 195 |
| —— *v.* Rowe | 295, 296 |
| Bright-Smith, *In re* | 65, 163 |
| Briscoe *v.* Baillie Hamilton | 14 |
| Bristow *v.* Warde | 329, 332 |
| Broadbent *v.* Barrow | 62, 168 |
| Brograve *v.* Winder | 296 |
| Bromage *v.* Lloyd | 3 |
| Bromfield *v.* Crowder | 248 |
| Brook *v.* Brook | 529 |
| Brooke, *In re* ('94, 1 Ch. 43) | 538 |
| —— —— (54 L. J. Ch. 102) | 420 |
| —— *v.* Garrod | 56 |
| —— *v.* Kent | 50 |
| —— *v.* Lewis | 193 |
| —— *v.* Turner | 165 |
| —— *v.* Warwick | 273 |
| Brookman's Trust, *In re* | 278 |
| Brooks *v.* Keith | 456 |
| Brophy *v.* Bellamy | 181 |
| Broughton *v.* Broughton | 359 |
| —— *v.* Errington | 274 |
| Brown, *In b.* | 53, 84 |
| —— *Re* (18 Ch. D. 61) | 393 |
| —— — (1 K. & J. 522) | 64 |
| —— *In re* (58 L. J. Ch. 420) | 238 |
| —— 's Settlement, *In re* | 333 |
| —— 's Trusts, *In re* | 239 |
| —— *v.* Bamford | 243 |
| —— *v.* Brown | 47, 53 |
| —— *v.* Burdett | 423 |
| —— *v.* Dawson | 274 |
| —— *v.* Gellatly | 280 |
| —— *v.* Higgs | 206, 225, 375 |
| —— *v.* Peck | 396 |
| —— *v.* Pocock | 243 |
| —— *v.* Pringle | 245 |
| —— *v.* Skirrow | 21 |
| Browne's Will, *In re* | 167 |
| —— *v.* Browne | 247 |
| —— *v.* Hammond | 79 |
| —— *v.* Kenyon | 296 |
| —— *v.* Paull | 358 |
| —— *v.* Stoughton | 389 |
| Browning *v.* Budd | 19, 452 |
| Brownson *v.* Lawrance | 290 |
| Bruce *v.* Bruce | 522 |
| Brunel *v.* Brunel | 525 |
| Brunt *v.* Brunt | 44 |
| Bryan, *In b.* | 40 |
| —— *v.* Collins | 390 |
| —— *v.* White (2 Rob. 315) | 28 |
| —— *v.* —— (14 Jur. 919) | 432 |
| Bryant, *In re* | 181 |
| Bryce, *In b.* | 20 |
| Bryon, *In re* | 238 |
| Bubb *v.* Yelverton | 231 |
| Buchanan *v.* Harrison | 327 |
| Buck, *Re* | 373 |
| Buckland *v.* Papillon | 56 |
| Buckle, *In re* | 196 |
| Buckley's Trusts, *In re* | 180 |
| Bucknall *v.* Cooper | 38 |
| Bull *v.* Pritchard | 248, 332 |
| Bullmore *v.* Wynter | 149, 395 |
| Bullock *v.* Bennett | 57, 395 |
| —— *v.* Downes | 376 |
| —— *v.* Stones | 259 |
| Bulteel *v.* Plummer | 467 |
| Bunny *v.* Hemsted | 435 |
| Burbey *v.* Burbey | 204 |
| Burden *v.* Burden | 358 |
| Burge *v.* Brutton | 359 |
| Burgess *v.* Burgess | 231 |
| —— *v.* Robinson | 425, 427 |
| Burgoyne *v.* Showler | 24, 25, 48 |
| Burke *v.* Jones | 202 |
| Burley *v.* Evelyn | 325 |
| Burls *v.* Burls | 47 |
| Burnaby *v.* Barsby | 372 |
| Burrough *v.* Philcox | 375 |
| Burrows, *In re* | 250 |
| Burt, *In b.* | 85 |
| —— *v.* Hellyar | 205 |
| —— *v.* Sturt | 391 |
| Burton's Will, *In re* | 168 |
| —— *v.* Fisher | 523 |
| —— *v.* Mount | 282 |
| —— *v.* Newbery | 36, 37 |
| Buseck, *In b.* | 3, 531 |
| Bush *v.* Cowan | 67 |
| Bushell, *In b.* | 13 |
| Busk *v.* Aldam | 68 |
| Butler *v.* Butler | 65 |
| —— *v.* Gray | 69, 375 |
| —— *v.* Greenwood | 437 |
| —— *v.* Lowe | 249 |
| Butlin *v.* Barry | 97 |
| Butter *v.* Ommaney | 321, 322 |
| Butterfield, *Re* | 358 |
| Butterworth *v.* Harvey | 296 |
| Byam *v.* Byam | 397 |
| —— *v.* Sutton | 195 |
| Byne *v.* Currey | 252 |
| Byng *v.* Byng | 475 |
| Byrd, *In b.* | 20, 26 |
| Byrom *v.* Brandreth | 234 |
| Bywater, *In re* | 503 |

C.


PAGE

Cadell *v.* Palmer ... 120, 323, 332, 334
Cadge, *In b.* ..... 48
Cadman *v.* Cadman ..... 181
Cadogan, *In re* ..... 233
Cafe *v.* Bent ..... 284
Cage *v.* Russel..... 425, 426, 427
Caldecott *v.* Caldecott..... 280
—— *v.* Harrison ..... 204
Callow *v.* Callow ..... 235
Calloway, *In b.* ..... 18
Calvert *v.* Sebbon..... 231
Cambridge *v.* Rous..... 319, 325
Camoys *v.* Blundell..... 450
Campbell, *Re* ('93, 2 Ch. 206) 281
—— *Re* ('93, 3 Ch. 468) 292
—— *v.* Beaufoy..... 529
—— *v.* Strangeways ... 260
Cannings *v.* Flower..... 259
Cant's Estate, *In re*..... 56
Capdevielle, *Re*..... 529
Capes *v.* Dalton ..... 250
Caplin's Will, *In re* ..... 205
—— *In re* ..... 69
Capon's Trusts, *Re* ..... 467
Capron *v.* Capron ..... 187
Carew, *Re* ..... 456
Carlyon *v.* Truscott ..... 537
Carmichael, *In b.* ..... 511
—— *v.* Gee ..... 195
Carne *v.* Long ..... 372
Carpenter *v.* Bott..... 230
Carr *v.* Eastabrooke ..... 275
—— *v.* Living..... 241, 358
Carron Company *v.* Maclaren 529
Carter, *In re* ..... 398
—— *v.* Haswell ..... 63
—— *v.* Seaton ..... 22
Cartwright *v.* Shepheard ... 440
—— *v.* Vawdry ..... 239
Carver *v.* Bowles ..... 329
Case *v.* Drosier ..... 326
Casement *v.* Fulton ..... 21, 80
Casmore, *In b.* ..... 83
Casson *v.* Dade ..... 21
Castle *v.* Fox..... 58
Catt's Trusts, *Re* ..... 420
Cattell, *In re*..... 390
Cattlin *v.* Brown ..... 328
Cattrall, *In b.* ..... 85
Cave *v.* Cave ..... 60
—— *v.* Harris ..... 58
Cavendish *v.* Mercer ..... 259
Cawood *v.* Thompson ..... 370
Cawthron, *In b.* ..... 15
Chamberlain *v.* Hutchinson 68

PAGE

Chambers *v.* Chambers ..... 283
—— *v.* Goldwin..... 258, 259
—— *v.* Queen's Proctor 25
Chamney, *In b.* ..... 28
Champion, *Re* ..... 58
Chancellor, *Re* ..... 283
Chancey's Case ..... 275, 276, 277
Chandler *v.* Pocock ..... 69
Chant, *In re* ..... 318
Chaplyn, *In b.* ..... 83
Chapman's Will, *In re* ..... 322
—— *In b.* ..... 54
—— *In re* ..... 455
—— *v.* Blissett ..... 246
—— *v.* Bradley ..... 530
—— *v.* Chapman ..... 233
—— *v.* Lamport ..... 244
—— *v.* Perkins ..... 395
—— *v.* Reynolds..... 233
Chappell, *In b.* ..... 443, 451
Charge *v.* Goodyear ..... 204
Charles *v.* Burke ..... 71
Charlton *v.* West ..... 275
Chatfield *v.* Berchtoldt..... 8, 528
Chatteris *v.* Young..... 252, 261
Chaytor, *In re* ..... 283
Cheadle, *In re* ..... 118, 161
Cheese *v.* Lovejoy..... 42
Cherry *v.* Boultbee ..... 463
Chester's Case ..... 262
—— *v.* Chester ..... 227
—— *v.* Urwick ..... 462
Chesterfield's Trusts, *Re* ... 284
Chichester *v.* Coventry ..... 277
—— *v.* Quatrefages ... 40
Chilcott, *In b.* ..... 54
Child *v.* Elsworth ..... 136
Childes, *In b.* ..... 434
Chinery, *In re* ..... 322
Chodwick *v.* Palmer ..... 21
Christian, *In b.* ..... 26
Christie v. Gosling ..... 428, 429
Christmas *v.* Whinyates ... 43, 51
Christophers *v.* White..... 359
Christopherson *v.* Naylor ... 322
Christ's Hospital *v.* Grainger 373
Church *v.* Kemble ..... 330
—— *v.* Mundy ..... 387
Church Patronage Trust, *In re* ..... 374
Churchill, *In b.* ..... 31
Circuitt *v.* Perry ..... 452
Clark, *In b.* ..... 21
—— *In re* ('04, 1 Ch. 294) 166
—— *Re* (31 Ch. D. 72)..... 37
—— *Re* (3 D. J. & S. 111) 323
——'s Trust, *Re* ..... 372

| | PAGE |
|---|---|
| Clark *v.* Browne | 464 |
| —— *v.* Sewell | 258, 275 |
| —— *v.* Taylor | 372 |
| Clarke, *In b.* (1 Sw. & Tr. 23) | 20 |
| —— —— ('96, P. 287) | 512 |
| —— *v.* Berkeley | 394 |
| —— *v.* Blake | 250 |
| —— *v.* Butler | 168 |
| —— *v.* Colls | 318 |
| —— *v.* Parker | 392 |
| —— *v.* Scripps | 43 |
| Clay, *In re* | 228 |
| —— and Tetley, *Re* | 542 |
| Claydon *v.* Green | 1 |
| Cleare *v.* Cleare | 19 |
| Cleasby *v.* Cleasby | 120 |
| Cleaver *v.* Spurling | 425 |
| Clements, *In b.* | 433 |
| —— *Re* | 168, 181 |
| Clerke *v.* Clerke | 138 |
| Cleveland Settled Estates, *Re* | 69, 161 |
| —— 's Estate, *Re* | 284 |
| Cliff's Trusts, *In re* | 11 |
| Clifford *v.* Clifford | 68 |
| —— *v.* Koe | 475 |
| Clifton *v.* Goodbun | 236 |
| Cline's Estate, *In re* | 187 |
| Clive *v.* Clive | 187, 397 |
| Clogstoun *v.* Wolcott | 45, 70 |
| Clough *v.* Wynne | 72 |
| Cloves *v.* Awdry | 70 |
| Clowes, *Re* | 55 |
| Clulow's Trust, *Re* | 389 |
| Clutterbuck, *In re* | 392 |
| Coape *v.* Arnold | 473 |
| Coard *v.* Holderness | 160 |
| Cobbold, *In re* | 73 |
| Cock *v.* Cooke | 12 |
| Cockayne, *In b.* | 43 |
| —— *v.* Harrison | 387 |
| Cockerell *v.* Barber | 231 |
| Cockran *v.* Cockran | 281 |
| Cockrell *v.* Cockrell | 523, 528 |
| Cockroft, *In re* | 289 |
| Cocks *v.* Manners | 372 |
| Coe *v.* Bigg | 224 |
| Cofield *v.* Pollard | 67 |
| Cogswell *v.* Armstrong | 63 |
| Colberg, *In b.* | 45 |
| Cole *v.* Fitzgerald | 273 |
| —— *v.* Scott | 58 |
| —— *v.* Sewell | 293, 334 |
| —— *v.* Willard | 275 |
| Coleby *v.* Coleby | 290 |
| Coleman, *In b.* | 27, 45 |
| Coles, *In b.* | 12 |

| | PAGE |
|---|---|
| Coles' Will, *In re* | 252 |
| —— *v.* Pilkington | 510 |
| Coley, *In re* | 150 |
| Colgan, *In re* | 259 |
| Colleton *v.* Garth | 273 |
| Collier *v.* Langebeare | 18 |
| —— *v.* Rivaz | 524, 528 |
| —— *v.* Squire | 165 |
| Collingwood *v.* Row | 55 |
| Collins *v.* Carey | 359 |
| —— *v.* Collins (L.R.12 Eq. 455) | 233, 234 |
| —— *v.* —— (2 M. & K. 703) | 282 |
| —— *v.* Elstone | 14 |
| —— *v.* Wakeman | 207, 208 |
| Colliss *v.* Hector | 527 |
| Colman, *In b.* | 22 |
| Colyer, *In b.* | 24 |
| —— *v.* Finch | 539 |
| Comiskey *v.* Bowring-Hanbury | 226 |
| Compton *v.* Bloxham | 50, 136, 231 |
| Conduitt *v.* Soane | 268 |
| Conolly *v.* Farrell | 260 |
| Conron *v.* Conron | 457 |
| Constable *v.* Constable | 187 |
| Conway *v.* Longville | 258 |
| Cook *v.* Dawson | 538, 540 |
| —— *v.* Jaggard | 161 |
| —— *v.* Lambert | 82 |
| Cooke, *In b.* | 43 |
| —— *v.* Cholmondeley | 93, 425, 509 |
| —— *v.* Cooke | 330 |
| —— *v.* Stationers' Co. | 207, 209 |
| —— *v.* Turner | 425 |
| Coombs, *In b.* | 82 |
| Cooper, *In b.* | 140 |
| —— 's Trusts, *In re* | 207, 209 |
| —— *v.* Bockett | 20, 25, 48, 50 |
| —— *v.* Day | 252 |
| —— *v.* Denison | 229 |
| —— *v.* Laroche | 331 |
| —— *v.* Macdonald | 242, 477 |
| —— *v.* Woolfitt | 404 |
| Cope, *In b.* | 26 |
| —— *In re* | 322 |
| —— *v.* De la Warr | 500 |
| Coppard's Estate, *In re* | 327 |
| Corbett, *In re* | 403 |
| —— 's Trusts, *In re* | 293 |
| Corbishley's Trusts, *Re* | 512 |
| Corby, *In b.* | 32 |
| Corbyn *v.* French | 320 |
| Corder, *In b.* | 15 |
| Corlass, *In re* | 250 |

| | PAGE |
|---|---|
| Corneby *v.* Gibbons | 15 |
| Corneck *v.* Wadman | 296 |
| Cornewall *v.* Cornewall | 272 |
| Cornwallis, *In re* | 420 |
| Corsellis, *In re* | 238 |
| Corser *v.* Cartwright | 541 |
| Cosier, *Re* | 493 |
| Cossey *v.* Cossey | 53 |
| Cotgrave, *In re* | 455 |
| Cottenham *v.* Pepys | 120 |
| Cotton and School Board, *In re* | 334 |
| Cotton, *Re* (1 Ch. D. 232) | 180 |
| —— *In re* (40 Ch. D. 41) | 70 |
| —— *v.* Cotton | 228 |
| Couch *v.* Stratton | 278 |
| Coulthard, *In b.* | 433 |
| Councell, *In b.* | 78 |
| Court, *In b.* | 443 |
| Courtenay, *In re* | 246 |
| —— *v.* Williams | 463 |
| Courtoy *v.* Vincent | 251 |
| Coventry *v.* Higgins | 258 |
| —— *v.* Williams | 12 |
| Coverdale *v.* Eastwood | 511 |
| Cowley *v.* Wellesley | 193 |
| Cowling *v.* Cowling | 233 |
| Cowx *v.* Foster | 70 |
| Cox's Trusts, *In re* | 187 |
| —— *v.* Bennett | 61 |
| —— *v.* Cox | 477 |
| —— *v.* Davie | 371 |
| —— *v.* Fonblanque | 455 |
| —— *v.* Godsalve | 404 |
| Coxen *v.* Rowland | 63 |
| Cozens, *In re* | 204 |
| Cradock *v.* Piper | 359 |
| Craigie *v.* Lewin | 522, 526 |
| Crane, *In re* | 259 |
| Cranmer's Case | 274, 275 |
| Crause *v.* Cooper | 224 |
| Craven, *In re* | 166 |
| Crawford, *In re* | 226 |
| Crawley *v.* Crawley | 281 |
| Crawshaw *v.* Crawshaw | 209, 436 |
| Crawshay, *In re* | 456 |
| Creagh *v.* Wilson | 393 |
| Creaton *v.* Creaton | 538 |
| Creed, *Re* | 511 |
| Cresswell, *In re* | 428 |
| —— *v.* Cresswell | 37, 438 |
| Crickett *v.* Dolby | 259 |
| Cripps *v.* Wolcott | 296 |
| Croft *v.* Croft | 25, 28 |
| Cromek *v.* Lumb | 293 |
| Crommelin *v.* Crommelin | 394 |
| Crompe *v.* Barrow | 324, 329 |
| Crompton *v.* Sale | 402 |
| Crook *v.* Whitley | 204 |
| Crookenden *v.* Fuller | 524 |
| Crosbie *v.* Macdoual | 435 |
| Cross *v.* Maltby | 294 |
| Croughton's Trusts, *In re* | 242 |
| Crowder *v.* Stone | 73, 293, 295 |
| Crowther, *Re* | 283 |
| Croxton *v.* May | 245 |
| Crozier *v.* Fisher | 296 |
| Cruddas, *In re* | 70 |
| Cruse *v.* Howell | 249 |
| Culsha *v.* Cheese | 63 |
| Cunliffe *v.* Brancker | 248 |
| Cunnack *v.* Edwards | 373 |
| Cunningham, *In b.* | 27, 51 |
| Cunynghame's Settlement, *In re* | 326 |
| Curnick *v.* Tucker | 225 |
| Currie, *In re* | 251 |
| Cutbush *v.* Cutbush | 357 |
| Cutto *v.* Gilbert | 40, 53 |


D.


| | |
|---|---|
| Dacre *v.* Patrickson | 290 |
| Dadds, *In b.* | 46 |
| Daintree *v.* Butcher | 22 |
| Dakin *v.* Cope | 357 |
| Dalhousie *v.* M'Douall | 520, 524 |
| Dallmeyer, *In re* | 404 |
| Dallow, *In b.* | 16, 85 |
| D'Almaine *v.* Moseley | 160 |
| Dalrymple *v.* Hall | 318 |
| Daly's Settlement, *Re* | 29, 520, 526 |
| Dancer *v.* Crabb | 43 |
| Daniell, *In b.* | 16 |
| —— *v.* Daniell | 296 |
| Darley *v.* Langworthy | 437 |
| Darling, *Re* | 373 |
| Darlow *v.* Edwards | 232 |
| Da Silva, *In b.* | 15 |
| Davenport *v.* Davenport | 397 |
| Daveron, *Re* | 334 |
| Davidson *v.* Dallas | 294 |
| —— *v.* Kimpton | 295 |
| Davies, *In b.* | 22 |
| —— Trusts, *In re* | 68 |
| —— *v.* Davies | 70, 257, 375 |
| —— *v.* Lowndes | 420 |
| Davis, *In b.* | 28 |
| —— *v.* Angel | 394, 425 |
| —— *v.* Bennet | 452 |
| —— *v.* Davis | 290 |
| Davy, *In b.* | 435 |
| —— *In re* | 404 |

| | PAGE |
|---|---|
| Dawson, *In re* | 331 |
| —— *v.* Dawson | 402 |
| —— *v.* Hearn | 167 |
| —— *v.* Oliver-Massey | 393 |
| —— *v.* Small | 73, 373 |
| Day, *In b.* | 353 |
| —— *v.* Day | 167, 368 |
| Deakin, *In re* | 236 |
| Dean, *In re* | 373 |
| —— *v.* Dean | 247 |
| —— *v.* Handley | 320 |
| Deare *v.* Elwyn | 96 |
| Debac, *In b.* | 46 |
| De Beauvoir *v.* De Beauvoir | 284 |
| Debeze *v.* Mann | 403 |
| De Bode, *In b.* | 42 |
| De Bonneval *v.* De Bonneval | 524, 526 |
| De Garagnol *v.* Liardet | 293 |
| De Geer *v.* Stone | 91 |
| De Gendre *v.* Kent | 368 |
| Deichman, *In b.* | 353 |
| De La Saussaye, *In b.* | 40, 436 |
| Delmar, *In re* | 375 |
| De Lusi's Trusts, *Re* | 68 |
| Dempsey *v.* Lawson | 40 |
| Denby, *In re* | 231 |
| Dench *v.* Dench | 49 |
| Dendy, *In b.* | 54 |
| Denn *v.* Page | 330 |
| De Pontès *v.* Kendall | 54 |
| Derbyshire, *In re* | 234 |
| Descrambes *v.* Tomkins | 256 |
| Devall *v.* Dickens | 228 |
| Devese *v.* Pontet | 274, 278 |
| Devisme *v.* Mello | 246 |
| Dew *v.* Clarke | 95 |
| Dewell, *In b.* | 52 |
| D'Eyncourt *v.* Gregory | 420, 430, 500 |
| D'Huart *v.* Harkness | 526 |
| Diaper, *In b.* | 28 |
| Dias *v.* De Livera | 206, 249 |
| Dickin, *In b.* | 434 |
| Dickins, *In b.* | 18 |
| Dickinson *v.* Dickinson | 59 |
| Dickson, *In b.* | 24 |
| —— *In re* | 180 |
| —— 's Trust, *Re* | 240, 425 |
| Diggles, *In re* | 226 |
| Dilkes, *In b.* | 83 |
| Dilley *v.* Matthews | 239 |
| Dimes *v.* Dimes | 93 |
| —— *v.* Scott | 280, 281, 284 |
| Dimond *v.* Bostock | 249, 250 |
| Dinmore, *In b.* | 22, 83 |
| Dixon, *Re* (42 Ch. D. 306) | 206 |
| Dixon, *In re* ('03, 2 Ch. 458) | 423 |
| —— *v.* Treasury Solicitor | 43 |
| Dobree, *Ex parte* | 260 |
| Dobson, *In b.* | 15 |
| —— *v.* Bowness | 59 |
| Dodd *v.* Wake | 245 |
| Doe *v.* Ashley | 164 |
| —— *v.* Bartle | 387 |
| —— *v.* Beauclerk | 421, 424 |
| —— *v.* Bower | 162 |
| —— *v.* Bowling | 162 |
| —— *v.* Burdett | 23 |
| —— *v.* Carpenter | 163, 387 |
| —— *v.* Claridge | 537 |
| —— *v.* Clark | 203 |
| —— *v.* Collins | 164 |
| —— *v.* Cross | 12 |
| —— *v.* Ellis | 115 |
| —— *v.* Fossick | 387 |
| —— *v.* Gell | 162 |
| —— *v.* Gunnis | 330 |
| —— *v.* Haslewood | 15 |
| —— *v.* Hole | 435 |
| —— *v.* Hopkinson | 247 |
| —— *v.* Hubbard | 164 |
| —— *v.* Hughes | 537 |
| —— *v.* Hurrell | 160 |
| —— *v.* Jersey | 163 |
| —— *v.* Jesson | 511 |
| —— *v.* Johnson | 163 |
| —— *v.* Lakeman | 427 |
| —— *v.* Langton | 165 |
| —— *v.* Ludlam | 115 |
| —— *v.* Meakin | 162 |
| —— *v.* Moore | 248 |
| —— *v.* Nepean | 511 |
| —— *v.* Nowell | 248 |
| —— *v.* Palmer | 48, 49 |
| —— *v.* Parkin | 164 |
| —— *v.* Pearson | 241 |
| —— *v.* Perratt | 230 |
| —— *v.* Pigott | 162 |
| —— *v.* Prigg | 296 |
| —— *v.* Rouse | 239 |
| —— *v.* Rout | 160 |
| —— *v.* Sheffield | 207 |
| —— *v.* Simpson | 203 |
| —— *v.* Stopford | 162 |
| —— *v.* Strickland | 47 |
| —— *v.* Tofield | 161, 166 |
| —— *v.* Trueman | 159 |
| —— *v.* Vaughan | 330 |
| —— *v.* Walker | 58 |
| —— *v.* Weatherby | 387 |
| —— *v.* Yates | 420 |
| Doglioni *v.* Crispin | 529 |
| Doherty *v.* Dwyer | 50 |

| | PAGE |
|---|---|
| Dolan *v.* Macdermot | 375 |
| Dolphin *v.* Robins | 520, 526 |
| Domville *v.* Taylor | 273 |
| —— *v.* Winnington | 500 |
| Don's Estate, *Re* | 530 |
| Donald, *In re* | 324, 373 |
| Donaldson, *In b.* | 30 |
| Donn *v.* Penny | 115 |
| Donovan *v.* Needham | 259 |
| Doo *v.* Brabant | 320 |
| Doody *v.* Higgins | 230 |
| Dorchester, Lord *v.* Effingham, Lord | 496 |
| Dorin *v.* Dorin | 235 |
| Dorsett *v.* Dorsett | 455 |
| Douce, *In b.* | 20 |
| Doucet *v.* Geoghegan | 525 |
| Douglas, *In re* | 373 |
| —— *v.* Andrews | 295 |
| —— *v.* Congreve | 280 |
| —— *v.* Douglas | 59, 521, 525 |
| Dowling's Trusts, *In re* | 186 |
| —— *v.* Tyrell | 260 |
| Down *v.* Down | 163 |
| Downer, *In b.* | 44 |
| Dowse *v.* Gorton | 358 |
| Dowsett, *In re* | 56, 62 |
| Drake *v.* Drake | 450 |
| Drake *v.* Martin | 164, 233 |
| Drant *v.* Vause | 56 |
| Draper, *In re* | 167 |
| Drax, *In re* | 420 |
| Drew, *In re* | 150 |
| Drewett *v.* Pollard | 391 |
| Drummond, *In b.* | 16, 18, 433 |
| —— *v.* Parish | 30 |
| Duane, *In b.* | 13 |
| Du Bochet, *In re* | 237 |
| Du Boulay *v.* Du Boulay | 420 |
| Dufaur *v.* Croft | 97 |
| Duffield *v.* Duffield | 248 |
| Dufour *v.* Pereira | 510 |
| Dugdale, *In re* | 241, 423 |
| Duggan *v.* Kelly | 392 |
| Duignan *v.* Walker | 360 |
| Dumble, *In re* | 168 |
| Duncan *v.* Cannan | 529 |
| —— *v.* Lawson | 519 |
| Dundas, *In b.* | 18 |
| —— *v.* Wolfe Murray | 256 |
| Dungannon *v.* Smith | 324, 325 |
| Dunlop, *In re* | 290 |
| Dunne *v.* Dunne | 420 |
| Dunster, *In re* | 113 |
| Durance, *In b.* | 42, 433 |
| Durham, *In b.* | 17 |
| Durnell *v.* Corfield | 98 |
| Durour *v.* Motteux | 207 |
| Durran *v.* Durran | 455 |
| Durrant *v.* Friend | 239 |
| Dutton, *In b.* | 45 |
| —— *Re* | 372 |
| —— *v.* Crowdy | 295 |
| Dyet, *In re* | 252 |
| Dyke, *In b.* | 440 |
| Dyson and Fowke, *Re* | 334 |


E.


| | PAGE |
|---|---|
| Eade *v.* Eade | 225 |
| Eager *v.* Furnivall | 78 |
| Eagles *v.* Le Breton | 205 |
| Eales *v.* Drake | 494 |
| Eames *v.* Hacon | 529 |
| Earle *v.* Bellingham | 195, 257 |
| —— *v.* Wilson | 237 |
| Early *v.* Benbow | 252 |
| —— *v.* Middleton | 249 |
| East *v.* Twyford | 11 |
| Eastwood *v.* Vinke | 274 |
| Eaton *v.* Sanxter | 483 |
| Eccles *v.* Cheyne | 78 |
| Eckersley *v.* Platt | 46 |
| Eddel's Trusts, *In re* | 77, 169, 248 |
| Eddels *v.* Johnson | 202 |
| Eddowes, *Re* | 375 |
| Eden *v.* Smyth | 462 |
| Edmondson *v.* Crosthwaite | 369 |
| Edmunds *v.* Fessey | 236 |
| —— *v.* Low | 275 |
| —— *v.* Waugh | 16, 168, 437 |
| Edwards, *In b.* | 17 |
| —— *In re* ('94, 3 Ch. 644) | 74 |
| —— —— ('06, 1 Ch. 570) | 319 |
| —— *v.* Champion | 203 |
| —— *v.* Edwards | 319, 320 |
| —— *v.* Fincham | 19 |
| —— *v.* Hall | 370 |
| —— *v.* Hammond | 248 |
| —— *v.* Saloway | 230 |
| —— *v.* Symons | 296 |
| —— *v.* Tuck | 245, 391 |
| Edyvean *v.* Archer | 397 |
| Eeles, *In b.* | 43 |
| —— *v.* England | 225 |
| Egan, *In re* | 234 |
| Egerton *v.* Brownlow | 396, 423 |
| Eidsforth *v.* Armstead | 537 |
| Elias *v.* Snowdon, &c. Co. | 193 |
| Ellcock *v.* Mapp | 226 |
| Elliot *v.* Davenport | 209, 321 |
| —— *v.* Merryman | 540 |

PAGE

Elliott, *In b.* ..... 140
—— *In re* ..... 423
—— *v.* Dearsley ..... 291
—— *v.* Elliott (12 Sim. 276) 327
—— *v.* —— (15 Sim. 321) 70
—— *v.* Fisher ..... 269
—— *v.* Smith ..... 319
Ellis, *In b.* ..... 22
——'s Trusts, *In re* ..... 242
—— *v.* Eden ..... 233
—— *v.* Houston ..... 239
—— *v.* Maxwell ..... 390, 391
—— *v.* Selby ..... 374
Ellison *v.* Cookson ..... 401
Elmore's Will, *In re* ..... 281
Elms *v.* Elms ..... 42, 43
Elmsley *v.* Young ..... 229
Emanuel *v.* Constable ..... 36
Emery's Estate, *In re* ..... 251
Emmerton, *In re* ..... 457
Emmet's Estate, *In re* ..... 321
Emmins *v.* Bradford ..... 318
Empson *v.* Soden ..... 404
Emson, *In re* ..... 422
Emuss *v.* Smith ..... 56, 61
English, *In b.* ..... 12
Eno *v.* Tatham ..... 291
Enohin *v.* Wylie ..... 529
Errat *v.* Barlow ..... 259
Errington *v.* Chapman ..... 259
Eustace, *In b.* ..... 42
Euston *v.* Seymour ..... 31
Evan Price, *In re* ..... 234
Evans, *In re* ..... 59
—— *v.* Angell ..... 165
—— *v.* Charles ..... 226
—— *v.* Dallow ..... 45
—— *v.* Davies ..... 238, 239
—— *v.* Evans ..... 69
—— *v.* Hellier ..... 389
—— *v.* Massey (8 Pri. 22) 239
—— *v.* —— (1 Y. & J. 196) 265
—— *v.* Roberts ..... 404
—— *v.* Stratford ..... 56
—— *v.* Tweedy ..... 203
Evanturel *v.* Evanturel ..... 509
Eve, *In re* (93 L. T. 235) ... 319
—— —— ('09, 1 Ch. 796) 236
Everett *v.* Everett ..... 59
Evers *v.* Challis ..... 326
Ewart, *In b.* ..... 511
—— *v.* Cochrane ..... 158
Ewen *v.* Franklin ..... 28
Ewing *v.* Orr Ewing ..... 529
Exmouth, *In re* ..... 496
Eynon, *In b.* ..... 27

PAGE

Eyre *v.* Eyre ..... 17, 434
—— *v.* Marsden ..... 295
—— *v.* Shaftesbury ..... 262

F.

Fairman *v.* Green ..... 259
Falkland *v.* Bertie ..... 424
Fane *v.* Fane ..... 430
Faraday, *In b.* ..... 140
Farmer *v.* Brock ..... 25
Farquhar, *In b.* ..... 30
Farrar *v.* Winterton ..... 55
Farrer *v.* St. Catherine's Coll. ..... 46, 251, 437, 449
Fary, *In b.* ..... 42
Faulds *v.* Jackson ..... 21, 22
Fawkes *v.* Gray ..... 268
Fearns *v.* Young ..... 281
Featherstone's Trusts, *Re* ... 251
Fell *v.* Biddolph ..... 36, 37
Fendall *v.* Goldsmid ..... 420
Fenn *v.* Death ..... 203
Fenton *v.* Livingstone ..... 530
Fenwick, *In b.* ..... 39, 40
Fergus (Executors of) *v.* Gore 203
Fergusson's Will, *In re* ..... 377
Fernandes' Executors' Case 528
Ferneley's Trusts, *In re* ..... 326
Ferraris *v.* Hertford ..... 16, 434
Ferrier *v.* Jay ..... 70
Festing *v.* Allen ..... 247
—— *v.* Taylor ..... 196
Fettiplace *v.* Gorges ..... 139
Finch *v.* Combe ..... 50, 51
Field, *In b.* ..... 20
—— *v.* Evans ..... 243
—— *v.* Peckett ..... 273
—— *v.* Seward ..... 403
Fielden *v.* Ashworth ..... 376
Fielding *v.* Preston ..... 168, 196
Fillingham *v.* Bromley ..... 420
Finch *v.* Hattersley ..... 538
—— *v.* Hollingsworth ..... 205
Finden *v.* Stephens ..... 131
Finlason *v.* Tatlock ..... 230
Finney *v.* Grice ..... 274
Firebrace *v.* Firebrace ..... 520
Fischer *v.* Popham ..... 23
Fish, *In re* ..... 204, 239
Fisher *v.* Brierley ..... 439
Fisk *v.* Att.-Gen. ..... 372
Fitch *v.* Weber ..... 207, 208
Fitzgerald *v.* Field ..... 162
Fitzroy, *In b.* ..... 39
Fitzwilliams *v.* Kelly ... 168, 447

PAGE

Flack *v.* Downing College ... 159
Fleck, *In re* ..... 291
Fleetwood, *In re* ..... 37, 387
Fleming *v.* Armstrong..... 244
—— *v.* Brook ..... 165
Fletcher, *In re* ..... 274
—— *v.* Ashburner..... 269
—— *v.* Sondes ..... 480
Floyer *v.* Bankes..... 197, 252
Foley, *In b.* ..... 49
—— *v.* Burnell .....268, 428
—— *v.* Parry ..... 225
—— *v.* Vernon ..... 40
Follett *v.* Pettman ..... 436
Foot *v.* Stanton..... 24
Forbes *v.* Forbes ..... 529
—— *v.* Peacock ..... 537
Ford *v.* De Pontès ..... 54
—— *v.* Ford ..... 387
Forest, *In b.*..... 36, 37
Foster, *In b.* ..... 353
—— *v.* Elsley ..... 131
—— *v.* Romney ..... 330
—— *v.* Smith ..... 195
Fothergill's Estate, *In re* ... 429
Foveaux, *Re* ..... 373
Fowkes *v.* Pascoe..... 402
Fowler *v.* Fowler ..... 274
—— *v.* Wyatt ..... 97
Fowlis *v.* Davidson ..... 94
Foy, *In b.*..... 80
Franchcombe *v.* Hayward ... 69
Francis, *In re* ..... 248
—— *v.* Collier..... 437
Franks, *Ex parte*..... 92
Fraser, *In b.*..... 42, 433
—— *In re* ..... 168
—— *v.* Fraser ..... 245
Freake *v.* Cranefeldt ..... 203
Freeman's Will, *In re*..... 375
—— *v.* Freeman ..... 40
Freemantle *v.* Banks ..... 402
Freer *v.* Freer ..... 464
—— *v.* Peacocke ..... 95
Freke *v.* Carbery.....391, 519
Freme's Contract, *Re* ..... 436
—— *v.* Clement ..... 57, 75
Frere *v.* Frere ..... 528
Frith, *In b.* ..... 26
Frogley, *In b.* ..... 235
—— *v.* Phillips ..... 204
Frost, *In re* .....331, 334
Fry *v.* Capper ..... 326
—— *v.* Fry ..... 493
—— *v.* Porter ..... 394
Fullerton *v.* Martin.....168, 396
Fullford *v.* Fullford..... 79

PAGE

Fulton *v.* Andrew..... 14
Furness, *In re* ..... 402

G.

G—— (an infant), *In re*..... 261
Gabb *v.* Prendergast ..... 235
Gainsford *v.* Dunn ..... 467
Gaitskell's Trust, *In re* ..... 320
Gale *v.* Gale ..... 56
Gally, *In b.* ..... 531
Gamboa's Trust, *In re*..... 230
Game, *In re* ..... 282
Gann *v.* Gregory .....48, 49
Gardiner, *In re*..... 391
—— *v.* Courthorpe..... 45
Gardner *v.* James ..... 246
Garland, *Ex parte* .....357, 358
—— *v.* Beverley ..... 449
—— *v.* Mead..... 4, 102
—— *v.* Thomas..... ... 296
Garner *v.* Garner..... 450
Garnett Botfield *v.* Garnett Botfield ..... 14
Garratt *v.* Weeks ..... 246
Garrett *v.* Noble ..... 357
Garrick *v.* Camden ..... 229
Garth *v.* Cotton ..... 193
Garthshore *v.* Chalie ..... 278
Garthside *v.* Isherwood ..... 95
Garthwaite *v.* Robinson..... 475
Gartside *v.* Silkstone, &c., Co. 260
Gascoigne *v.* Barker..... 136
Gaskell *v.* Holmes ..... 322
Gaskin *v.* Rogers ..... 36
Gattward *v.* Knee..... 31
Gauntlett *v.* Carter ..... 136
Gausden, *In re* ..... 82
Gaze *v.* Gaze ..... 20, 22
Geale, *In b.* ..... 20
Geaves *v.* Price..... 443
Gee, *In b.* ..... 85
—— *v.* Liddell ..... 323
Genery *v.* Fitzgerald ..... 168
Gent *v.* Harrison ..... 192
George, *In re*..... 180
Gibbes' Settlement, *Re* .....67, 71
Gibbins *v.* Eyden..... 62, 290
Gibbon *v.* Gibbon..... 59
Gibbons *v.* Langdon..... 295
Gibbs, *In re* ..... 160
—— *v.* Lawrence ..... 165
—— *v.* Rumsey .....207, 208
Gibson, *Re* ..... 59, 439
—— *v.* Bott ..... 197, 256, 257
—— *v.* Fisher..... 392

PAGE

Gibson *v.* Gibson ..... 57
Gilbert, *In b.* ('93, P. 183) ... 50
—— —— (78 L. T. 762) 85
—— *v.* Boorman .....246, 249
Gilbertson *v.* Richards..... 326
Giles *v.* Giles ..... 322
—— *v.* Warren ..... 44
Gill *v.* Barrett ..... 460
—— *v.* Gill ..... 44, 48
Gillet *v.* Wray ..... 393
Gillett *v.* Gane ..... 450
Gilley *v.* Burley ..... 369
Gilliat *v.* Gilliat ..... 233, 262
Gillins, *In re* ..... 58
Gillman *v.* Daunt..... 246
Gimblett *v.* Purton ..... 246
Girdlestone *v.* Doe ..... 319
Glass *v.* Richardson ..... 159
Glassington, *In re* ..... 161
Glenorchy *v.* Bosville ..... 397
Glover, *In b.* ..... 20
Goddard *v.* Vere ..... 95
Godden, *Re* ..... 284
Godfrey *v.* Davis ..... 235
—— *v.* Harben ..... 68
Goldring *v.* Inwood ..... 375
Gooch *v.* Gooch..... 249
Good, *In re* .....324, 373
Goodale *v.* Gawthorne..... 169
Goodenough, *In b.* ..... 54
—— *Re* ..... 284
—— *v.* Tremanondo 282
Goodier *v.* Edmunds ..... 334
Goodlad *v.* Burnett ..... 59
Goodman's Trusts, *Re* ..... 530
—— *v.* Goodman ..... 295
Goodtitle *v.* Southern..... 163
Goodwin's Trust, *In re* ..... 238
Goold *v.* Teague ..... 56
Goose *v.* Brown ..... 20
Gordon, *In b.* ..... 440
—— *v.* Gordon ..... 137, 237
—— *v.* Woodford ..... 192
Gorringe, *In re* ..... 322
Gorst *v.* Lowndes..... 260
Gosden *v.* Dotterill ..... 251
Gosling, *In b.* ..... 42
—— *v.* Carter..... 537
—— *v.* Gosling ..... 429
Gossling, *In re* ..... 180
Gould *v.* Lakes ..... 40
Gout *v.* Zimmermann 520, 523, 526
Gove *v.* Gawen ..... 25, 26
Gover *v.* Davis..... 166, 233
Gower *v.* Eyre ..... 119
—— *v.* Gower ..... 273
Grafftey *v.* Humpage ..... 229

PAGE

Graham *v.* Graham ..... 274
—— *v.* Lee ..... 388
—— *v.* Wickham ..... 277
Grainger *v.* Slingsby ..... 233
Grant *v.* Dyer ..... 393
—— *v.* Grant ..... 260
—— *v.* Mussett ..... 234
Grassi, *In re* ..... 519, 531
Gravenor *v.* Hallum..... 207
—— *v.* Watkins ..... 72
Graves *v.* Dolphin ..... 240
—— *v.* Weld..... 404
Gray, *In re* ..... 368
—— *v.* Siggers..... 284
Grayburn *v.* Clarkson ..... 507
Graydon *v.* Hicks..... 393
Greata, *In b.*..... 84
Greated *v.* Greated ..... 290
Greaves' Settlement Trusts, *Re* ..... 29, 69
—— *v.* Tofield ..... 196
Green, *In b.* ..... 17
—— *In re* ..... 168
——'s Settlement, *Re* ..... 511
—— *v.* Dunn ..... 63
—— *v.* Ekins ..... 168, 259
—— *v.* Green..... 73
—— *v.* Jackson ..... 207
—— *v.* Marsden..... 205
—— *v.* Symonds ..... 165
—— *v.* Tribe ..... 432
Greenough *v.* Martin ..... 435
Greenway *v.* Greenway ..... 73
Greenwell *v.* Greenwell ..... 259
Greenwood, *In b.* ..... 50, 84
—— *In re* ..... 455
—— 's Will, *Re* ..... 376
—— *v.* Greenwood..... 94
—— *v.* Percy ..... 293
Greetham *v.* Colton..... 537
Gregory's Settlement and Will, *Re* ..... 450
—— *v.* Queen's Proctor 11, 15, 24
Gregson's Trusts, *Re* .....296, 450
Greig, *In b.* ..... 45
—— *v.* Martin ..... 16
Gresley *v.* Mousley ..... 3
Greves, *In b.* ..... 16, 434
Greville *v.* Brown ..... 457
—— *v.* Tylee ... 11, 48, 49, 98
Grey's Trusts, *In re*..... 530
Grice *v.* Funnell ..... 435
Grier *v.* Grier ..... 397
Grieve *v.* Grieve ..... 475
Grieves *v.* Rawley ..... 203
Griffith, *In b.* ..... 443

PAGE

Griffith, *In re* ..... 187
—— *v.* Pownall ..... 328
Griffiths *v.* Gale ..... 78
—— *v.* Griffiths ..... 24, 27
—— *v.* Smith ..... 268
—— *v.* Vere ..... 389, 391
Grimani *v.* Draper ..... 93
Grimston *v.* Bruce ..... 425
Grimwood *v.* Cozens ..... 45
Groom, *In re* ..... 247
Groos, *In b.* ..... 532, 533
Grove's Trusts, *In re* ..... 194
Groves *v.* Groves ..... 245
—— *v.* Wright ..... 386
Grutten *v.* Digby ..... 527
Grylls' Trusts, *In re* ..... 228
Guardhouse *v.* Blackburn ... 13
Gullan, *In b.* ..... 47
—— *v.* Grove ..... 47
Gulliver *v.* Ashby ..... 424, 427
—— *v.* Poyntz ..... 162
—— *v.* Vaux ..... 423
Gully *v.* Davis ..... 65
Gunning, *In b.* ..... 83
Gurney *v.* Gurney ..... 36
Guthrie *v.* Walrond ..... 166, 168
Guyton and Rosenberg's Contract, *In re* ..... 65
Gwillim *v.* Gwillim ..... 23, 24

H.

Hackett, *In b.* ..... 31
Hagger *v.* Payne ..... 245
Hains, *In b.* ..... 46, 433
Hakewell, *In b.* ..... 18
Haldane *v.* Eckford ..... 525
Hale *v.* Bushill ..... 56
—— *v.* Hale ..... 327
—— *v.* Tokelove ..... 54
Haley *v.* Bannister ..... 390
Halford *v.* Halford ..... 15
Hall, *In b.* ..... 11
—— *In re* ..... 239
——'s Will, *Re* ..... 387
—— *v.* Fisher ..... 163
—— *v.* Hall (L. R. 1 P. & D. 481) ..... 97
—— *v.* —— ('92, 1 Ch. 361) 165
—— *v.* Hill ..... 403
—— *v.* Jones ..... 262
—— *v.* Leitch ..... 437
—— *v.* May ..... 179
—— *v.* Robertson ..... 318
—— *v.* Waterhouse ..... 139
Hallifax *v.* Wilson ..... 296

PAGE

Halliwell, *In b.* ..... 433
Hally, *In b.* ..... 17
Hallyburton, *In b.* ..... 526
Halton *v.* Foster ..... 229
Hames *v.* Hames ..... 228
Hamilton, *In re* ..... 225, 226
—— *v.* Dallas ..... 524
—— *v.* Hodsdon ..... 160
Hammersley, *In re* ..... 166
Hammond, *In b.* ..... 20
Hampton *v.* Holman ..... 330, 332
Hancock, *In re* ..... 326
Hannam, *In b.* ..... 27
—— *Re* ..... 321
Harbin *v.* Darby ..... 359
—— *v.* Masterman ('96, 1 Ch. 351) 167
—— *v.* —— ('95, A. C. 186) ... 389, 390
Harding *v.* Glyn ..... 226
—— *v.* Harding ..... 289
Hardman *v.* Johnson ..... 162
Hardwick *v.* Hardwick ..... 163
Hardwicke *v.* Douglas ..... 63, 436
Hardy, *Ex parte* ..... 56
—— *In re* ..... 274
Hare, *In b.* ..... 24
—— *v.* Pryce ..... 430
Hargreaves, *In re* ..... 331
—— *v.* Mitchell ..... 203
Harlin, *In re* ..... 36
Harloe *v.* Harloe ..... 493
Harman, *Re* ..... 69
Harnett *v.* Macdougall ..... 243
Harper, *In b.* ..... 54
Harper's Trustees *v.* Bain ... 234
Harrington *v.* Harrington 69, 429
Harris, *In b.* ..... 17, 45, 50
—— *In re* ..... 100
—— *v.* Berrall ..... 44
—— *v.* Davis ..... 320, 436
—— *v.* Knight ..... 24, 47
—— *v.* Lloyd ..... 235, 236, 246
Harrison, *In re* ('94, 1 Ch. 561) ..... 236
—— *Re* (30 Ch. D. 390) 16, 50
—— *v.* Asher ..... 233
—— *v.* Elvin ..... 26
—— *v.* Harrison ..... 293
—— *v.* Jackson ..... 464
Harrop *v.* Howard ..... 243
Harter *v.* Harter ..... 13
Hartland *v.* Murrell ..... 538
Hartley, *In re* ..... 421
—— *v.* Ostler ..... 438
—— *v.* Tribber ..... 239
Hartshorne *v.* Nicholson ... 370

PAGE
Harvey's Estate, *In re*..... 79
Harvey, *In re* ..... 325
—— *v.* Aston ..... 394
—— *v.* Harvey (5 Beav. 134)... 282
—— *v.* —— (3 Jur. 949) 249
—— *v.* —— (2 P. W. 21) 258
—— *v.* —— (23 W. R. 478)..... 42
—— *v.* Towell ..... 428
Harwood *v.* Baker ..... 96, 97
—— *v.* Goodright..... 100
Haseldine, *In re* ..... 236
Haslewood *v.* Green ..... 230
Hasluck *v.* Pedley ..... 187
Hassel *v.* Hassel ..... 457
Hassell *v.* Hawkins..... 275, 276
Hastie's Trusts, *In re*..... 236
Hastilow *v.* Stobie ..... 19
Hatton, *In b.* ..... 26
—— *v.* May ..... 167
Haughton *v.* Harrison ..... 246
Havelock *v.* Havelock..... 181
Hawes *v.* Hawes ..... 251
Hawkins, *Ex parte* ..... 55
—— *v.* Allen..... 371
—— *v.* Hawkins ..... 227
—— *v.* Luscombe..... 420
Hawksley *v.* Barrow ..... 42
Haws *v.* Haws ..... 296
Hawthorn *v.* Sheddon ..... 66, 69
Hay, *In re* ..... 51
—— *v.* Coventry ..... 331
Hayes, *In b.* ..... 31
—— *In re* ..... 70
—— *v.* Oatley ..... 68
Haynes, *In re*..... 420
—— *v.* Haynes ..... 55, 251
—— *v.* Hill ..... 51, 433
—— *v.* Mico ..... 274
Hayward, *Re*..... 455
Heach *v.* Pritchard ..... 162
Hearle *v.* Greenbank ..... 92, 259
—— *v.* Hickes ..... 435
Hearn *v.* Allen ..... 161
—— *v.* Baker..... 296
Heath, *In b.* ..... 51
—— *v.* Chapman..... 374
—— *v.* Lewis ..... 392
—— *v.* Perry ..... 258
—— *v.* Samson ..... 523, 524
Heathcote, *In b.* ..... 17
—— *In re* ..... 390
——, 's Trusts, *In re* ... 320
Heather *In re* ..... 402
Hebblethwaite *v.* Cartwright 249
Hedges *v.* Harpur..... 194
Hellier *v.* Hellier ..... 40, 53
Hellman's Will, *Re*..... 521
Hemmings *v.* Munckley..... 393
Henchman *v.* Att.-Gen. ..... 207
Henderson, *In re* ..... 226
Henfrey *v.* Henfrey..... 40
Hengler, *Re* ..... 284
Henshaw *v.* Atkinson ..... 370
Hensman *v.* Fryer ..... 62
Henvell *v.* Whitaker ..... 538
Hepburn *v.* Skirving ... 58, 59, 522
Heptinstall *v.* Gott ..... 207, 209
Hepworth *v.* Hill..... 290
Herbert's Trusts, *In re* ..... 236
—— 's Will, *In re* ..... 92
—— *v.* Herbert ..... 30
—— *v.* Reid..... 232
—— *v.* Webster ..... 326
Hernando, *Re* ..... 67
Herrick *v.* Franklin..... 475
Herring, *In re* ..... 57, 368
Hertford *v.* Lowther ..... 165, 438
Hervey *v.* M'Laughlin..... 319
Hetley, *In re*..... 226
Hewitson *v.* Todhunter ..... 229
Hewitt *v.* Kaye..... 118
—— *v.* Morris ..... 280
Heydon's Will, *In re* ..... 161
Heywood *v.* Heywood..... 391
Hibbert *v.* Hibbert .....205, 238
Hibon *v.* Hibon ..... 162, 164
Hickman *v.* Upsall .....195, 512
Hicks, *In b.* ..... 433
—— *v.* Ross ..... 194
Higgins, *In b.* ..... 20
Higginson *v.* Barneby..... 397
Highgate Archway Co. *v.* Jeakes..... 56
Hill, *In b.* ..... 30
—— *In re* ..... 496
——'s Trusts, *In re* ..... 320
—— *v.* Bullock ..... 274
—— *v.* Chapman ..... 245
—— *v.* Crook..... 235, 236
—— *v.* Hill ..... 260, 397
—— *v.* Rattey ..... 194
Hinchcliffe *v.* Hinchcliffe 277, 438
Hinckley *v.* Simmons.....319, 510
Hind *v.* Selby ..... 282
Hindle *v.* Taylor ..... 195, 477
Hindmarch, *In b.*..... 48
Hindmarsh *v.* Charlton ..... 27
Hinds, *In b.* .....20, 26, 51
Hindson *v.* Weatherill ..... 97, 98
Hine, *In b*..... 44
Hinsley *v.* Ickeringill ..... 68
Hinves *v.* Hinves ..... 282

| | PAGE |
|---|---|
| Hiscock, *In b.* | 31 |
| Hitch *v.* Wells | 23 |
| Hoare *v.* Byng ..... 161, | 423 |
| —— *v.* Osborne (L.R. 1 Eq. 585)..... | 373 |
| —— *v.* —— (33 L.J.Ch. 586) ... 38, | 231 |
| Hobbs *v.* Knight | 43 |
| Hobson *v.* Blackburn | 510 |
| Hockley *v.* Mawbey | 328 |
| Hodge's Legacy, *Re* | 422 |
| —— *v.* Foot | 294 |
| Hodges *v.* Hodges | 244 |
| Hodgkinson, *In b.* | 53 |
| —— *v.* Barrow | 167 |
| Hodgson, *In re* | 478 |
| —— *v.* Bective.....168, | 169 |
| —— *v.* Clarke | 450 |
| —— *v.* De Beauchesne 522, | 524 |
| —— *v.* Halford..... 392, | 425 |
| —— *v.* Jex | 166 |
| Hodkinson *v.* Quinn | 540 |
| Hodsden *v.* Lloyd | 139 |
| Hodson *v.* Ball | 327 |
| Hogg *v.* Cook | 204 |
| —— *v.* Jones .....428, | 429 |
| Hoghton *v.* Whitgreave | 296 |
| Holder *v.* Preston | 159 |
| —— *v.* Ramsbottom | 273 |
| Holford, *Re* .....180, | 181 |
| Holgate, *In b.* | 24 |
| —— *v.* Jennings | 280 |
| Holland *v.* Allsop | 294 |
| Hollingsworth *v.* Grasett | 231 |
| Hollinrake *v.* Lister | 426 |
| Holloway *v.* Clarkson | 229 |
| —— *v.* Radcliffe | 376 |
| Holmes *v.* Godson ..... 241, | 423 |
| —— *v.* Holmes | 402 |
| —— *v.* Prescott .....168, | 247 |
| Holmesdale *v.* West | 396 |
| Holt *v.* Sindry | 237 |
| —— *v.* Winchester | 477 |
| Holyland *v.* Lewin | 78 |
| Homer *v.* Homer | 164 |
| Hone's Trusts, *In re* | 78 |
| Honywood *v.* Honywood | 192 |
| Hood *v.* Hood | 289 |
| Hooper, *In re* | 450 |
| Hope *v.* Campbell | 95 |
| —— *v.* Hope | 70 |
| Hopkin's Trusts, *Re* .....317, | 368 |
| —— *v.* Abbott | 235 |
| —— *v.* Hopkins .....169, | 332 |
| Hopwood *v.* Hopwood | 437 |
| Horlock, *Re* | 275 |
| Horlock *v.* Wiggins | 275 |
| Horn *v.* Coleman | 376 |
| Horne *v.* Horne | 46 |
| Horner, *In re* ..... 228, 235, | 236 |
| Horner's Estate, *Re* | 294 |
| Horseman *v.* Abbey | 246 |
| Horsford, *In b.* .....50, 51, | 84 |
| Horsnaill, *In re* | 334 |
| Hoskins, *In b.* | 20 |
| —— Trusts, *In re* | 68 |
| —— *v.* Matthews | 525 |
| Hotchkiss' Trusts, *In re* | 322 |
| Hotham *v.* Sutton | 166 |
| Hougham *v.* Sandys | 165 |
| Houghton *v.* Franklin | 197 |
| Houlding *v.* Cross | 273 |
| How, *In b.* | 140 |
| Howard, *In b.* | 528 |
| —— *In re* | 395 |
| —— *v.* Chaffers | 540 |
| —— *v.* Collins | 296 |
| Howarth, *In re* (L. R. 8 Ch. 415)..... | 181 |
| —— —— ('09, 1 Ch. 485)..... | 195 |
| —— *v.* Mills | 237 |
| Howden, *In b.* | 17 |
| Howe *v.* Dartmouth ..... 281, | 284 |
| Howell, *In b.* | 83 |
| Hubbard, *In b.* | 433 |
| —— *v.* Alexander | 438 |
| —— *v.* Lees | 30 |
| —— *v.* Young | 282 |
| Hubbuck, *In b.* | 16 |
| —— *In re* | 284 |
| Huber, *In b.* | 526 |
| Huckvale, *In b.* ..... 23, | 83 |
| Huddlestone, *In b.* | 13 |
| —— *Re* | 70 |
| Hudson *v.* Parker..... 20, 23, | 24 |
| Hughes, *In b.* (12 P. D. 107) | 83 |
| —— —— (4 Sw. & Tr. 209)..... | 139 |
| —— *v.* Empson | 507 |
| —— *v.* Jones | 58 |
| —— *v.* Pritchard | 160 |
| —— *v.* Wynne | 203 |
| Hugo, *In b.* | 14 |
| Huguenin *v.* Baseley | 97 |
| Huish, *In re* | 275 |
| Hull *v.* Hill | 234 |
| Hulme *v.* Tenant | 244 |
| Humberston *v.* Humberston | 397 |
| Humberstone *v.* Stanton | 320 |
| Humble *v.* Shore.....113, 209, | 436 |
| Hume, *Re* | 369 |
| —— *v.* Richardson | 233 |

PAGE

Humfrey *v.* Humfrey ..... 224
Humphrey *v.* Humphrey ... 72
Humphreys, *In re* ..... 180
—— *v.* Howes.....320, 322
Humphries, *Re*..... 238
Hunt, *In b.* (2 Rob. 622) 16, 18, 434
—— —— (L. R. 3 P. & D.) ..... 510
—— —— ('96, P. 288)... 444
—— *v.* Hunt..... 84
Hunter, *Re* ..... 374
—— *v.* Bullock ..... 373
—— *v.* Cheshire..... 322
Hurry *v.* Hurry ..... 224
—— *v.* Morgan ..... 294
Hurst *v.* Beach..... 438
—— *v.* Hurst..... 240
Husbands *v.* Husbands ..... 403
Hutcheson *v.* Hammond ... 207
—— *v.* Jones ..... 246
Hutchins *v.* Osborne ..... 67
Hutchinson and Tenant, *In re*..... 205, 225
—— *v.* Barrow ..... 58
—— *v.* Smith..... 273
Hutton, *In b.* ..... 434

I.

Ibbetson, *In b.* ..... 50
—— *In re*..... 224
Ilchester, *Ex parte* ..... 261
Illingworth *v.* Cooke ..... 250
Ilott *v.* Genge ..... 23
Ince, *In b.* ..... 440
Inchley *v.* Robinson ..... 161
Incledon *v.* Northcote..... 258
Inderwick *v.* Tatchell..... 293
Indian Chief, The ..... 526
Ingilby *v.* Amcotts ..... 5
Ingle *v.* Richards..... 445
Inglesant *v.* Inglesant..... 22
Ingoldby *v.* Ingoldby ..... 433
Ingram *v.* Soutten ..... 320
Inman, *In re*.....180, 257
Irvin *v.* Ironmonger ..... 197
Irvine *v.* Sullivan..... 225
Isaacs, *Re* ..... 56

J.

Jackson, *In re* (21 Ch. D. 786) 419
—— *Re* (25 Ch. D. 162) 250
—— *v.* Calvert ..... 475

PAGE

Jackson *v.* Dover ..... 250
—— *v.* Hurlock..... 207
—— *v.* Pease ..... 62
Jacob *v.* Jacob ..... 61
Jagger *v.* Jagger ..... 389
James, *In b.*..... 50
—— *v.* Shrimpton ..... 46
Jameson, *In re* ..... 59
Jaques, *In re* .....277, 402
Jarman's Estate, *In re* ..... 374
—— Trusts, *In re* ..... 295
—— *v.* Vye ..... 73
Jarvis *v.* Pond ..... 322
Jauncey *v.* Att.-Gen. .....252, 439
Jebb *v.* Tugwell ..... 136
Jee *v.* Audley ..... 244, 331
Jeffery, *Re* ('91, 1 Ch. 671)... 180
—— *Re* ('95, 2 Ch. 577)... 181
—— *v.* Cancer Hospital... 50
Jeffreys *v.* Jeffreys ..... 422
Jellicoe *v.* Gardiner ..... 500
Jenkins *v.* Gaisford ..... 20
—— *v.* Morris..... 94
Jenner, *In b.* .....22, 433
—— *v.* Finch ..... 22, 40
—— *v.* Turner..... 392
Jepson *v.* Key ..... 58
Jervoise *v.* Northumberland 397
Jesson *v.* Wright ..... 329
Jessopp *v.* Watson..... 207, 269
Jewis *v.* Lawrence .....231, 232
Jodrell *v.* Jodrell ..... 358
Johnson, *In b.* ..... 353
—— *In re* (53 L. J. Ch. 1116) ..... 294
—— *In re* (89 L. T. 520) 234
—— *In re* (92 L. T. 357) 167
—— 's Trusts, *Re* ..... 428
—— *v.* Ball ..... 19
—— *v.* Blane ..... 94
—— *v.* Johnson ..... 78, 283
—— *v.* Lyford ..... 49, 543
—— *v.* Routh ..... 228
Johnston, *In re* ('94, 3 Ch. 204) ..... 423
—— *In re* (26, Ch. D. 538) ..... 496, 497
—— *v.* Moore ..... 257, 284
—— *v.* Swann ..... 370
Johnstone *v.* Beattie ..... 521
—— *v.* Harrowby ..... 438
Jones, *In b.* .....22, 82
—— *In re* (34 Ch. D. 65)... 68
—— —— ('98, 1 Ch. 438) 226
—— *v.* Goodrich ..... 98
—— *v.* Henley ..... 232
—— *v.* Hensler ..... 78

| | PAGE |
|---|---|
| Jones *v.* How | 278 |
| —— *v.* Jones | 296, 393 |
| —— *v.* Maggs | 391 |
| —— *v.* Mitchell | 207 |
| —— *v.* Nicolay | 12 |
| —— *v.* Ogle | 187 |
| —— *v.* Salter | 243 |
| —— *v.* Sefton | 165 |
| —— *v.* Southall | 67, 464 |
| —— *v.* Wyse | 240, 388 |
| Jopp *v.* Wood | 529 |
| Jordan *v.* Fortescue | 437 |
| Josh *v.* Josh | 165 |
| Josselyn *v.* Josselyn | 258 |
| Joys, *In b.* | 41 |
| Judkin's Trusts, *In re* | 180 |
| Jull *v.* Jacobs | 37 |
| Jupp, *Re* | 206 |

K.

| | |
|---|---|
| Kampf *v.* Jones | 330 |
| Kay *v.* Oxley | 159 |
| Kearsley *v.* Woodcock | 241 |
| Keating *v.* Brooks | 26 |
| Keay *v.* Boulton | 230 |
| Kebble, *Ex parte* | 259 |
| Keen *v.* Keen | 46, 49 |
| Keep's Will, *In re* | 294 |
| Keigwin *v.* Keigwin | 20, 22, 48 |
| Kekewich *v.* Barker | 250 |
| Kell *v.* Charmer | 11 |
| Kelly *v.* Hammond | 239 |
| —— *v.* Powlet | 272 |
| —— *v.* Thewles | 97 |
| Kelsey, *In re* | 404 |
| Kendall, *In b.* | 49 |
| —— 's Trusts, *In re* | 168 |
| —— *v.* Kendall | 166 |
| Kenlis *v.* Bective | 500 |
| Kennell *v.* Abbott | 207 |
| Kennett, *In b.* | 44 |
| Kenrick *v.* Beauclerk | 537 |
| Kent *v.* Kent | 70 |
| Kerr *v.* Middlesex Hospital | 194 |
| Kershaw, *Re* | 290 |
| —— 's Trusts, *In re* | 265 |
| Kettlewell, *In re* | 395 |
| Kidd, *Re* | 290 |
| —— *v.* North | 438 |
| Kiddle, *In re* | 236 |
| Killick, *In b.* | 22 |
| Kilner *v.* Leech | 226 |
| Kilvington *v.* Gray | 280 |
| Kime *v.* Welfitt | 258 |
| Kimpton, *In b.* | 84 |
| King, *In b.* | 47 |
| —— *v.* Foxwell | 526 |
| —— *v.* Frost | 293 |
| —— *v.* George | 387 |
| —— *v.* Taylor | 319 |
| Kingdon, *Re* | 41, 42 |
| Kingsbury *v.* Collins | 404 |
| —— *v.* Walter | 250 |
| Kinnear, *In re* | 322 |
| Kirby's Case | 15 |
| Kirby-Smith *v.* Parnell | 160 |
| Kirk, *In re* | 422 |
| —— *v.* Eddowes | 403 |
| Kirkbank *v.* Hudson | 370 |
| Kirwan's Trusts, *Re* | 29, 527 |
| Knight, *In re* | 61 |
| —— *v.* Gould | 231 |
| —— *v.* Knight | 225 |
| —— *v.* St. John | 119 |
| Knollys *v.* Shepherd | 56, 483 |
| Knowles, *In re* | 227, 250 |

L.

| | |
|---|---|
| Labouchere *v.* Tupper | 358 |
| Lacey *v.* Hill | 4 |
| Lachlan *v.* Reynolds | 323 |
| Lacon, *In re* | 277 |
| Lacroix, *In b.* | 531 |
| Lagesse *v.* Allard | 81 |
| Lake *v.* Butler | 360 |
| —— *v.* Currie | 66, 67 |
| Laker *v.* Hordern | 236 |
| Lambe *v.* Eames | 225 |
| Lambert, *In b.* | 43 |
| —— *In re* | 322 |
| Lancashire *v.* Lancashire | 396 |
| Lancefield *v.* Iggulden | 62 |
| Lane, *In b.* | 353 |
| —— *v.* Debenham | 179 |
| Langdale *v.* Briggs | 58, 59, 420 |
| —— *v.* Whitfield | 234 |
| Langford, *In b.* | 353 |
| Langhorn, *In b.* | 433 |
| Lansdowne, *In b.* | 18 |
| Lantsbery *v.* Collier | 333 |
| Lapsley *v.* Grierson | 511 |
| La Terriere *v.* Bulmer | 280 |
| Lauderdale Peerage, The | 525 |
| Lawes, *In re* | 277 |
| —— *v.* Bennett | 55 |
| Lawford *v.* Davies | 260 |
| Lay, *In b.* | 31 |
| Leach, *In b.* | 24 |
| —— *v.* Jay | 179 |
| Leake *v.* Robinson | 259, 324, 328, 332 |

PAGE

Lechmere & Lloyd, *In re* ... 247
—— *v.* Carlisle ..... 278
Lee *v.* Brown..... 265, 275
—— *v.* Lee ..... 229
—— *v.* Okey ..... 475
—— *v.* Pain ..... 249, 438
Leech *v.* Bates ..... 24
Leeds *v.* Amherst..... 192
Leeming *v.* Sherratt ..... 293, 295
Lees *v.* Massey ..... 205
Leese, *In b.* ..... 443
—— *Re* ..... 32
Le Grice *v.* Finch..... 464
Leigh, *In b.* ..... 48
—— *v.* Leigh...246, 249, 358, 420
Leighton *v.* Leighton ..... 401
Lemage *v.* Goodban..... 40
Le Marchant *v.* Le Marchant 225
Leng *v.* Hodges..... 245
Leonard *v.* Leonard..... 26
—— *v.* Sussex ..... 396
Lepine *v.* Bean ..... 240
Lesingham's Trusts, *In re* ... 318
Lester *v.* Garland ..... 260
Le Sueur *v.* Le Sueur ..... 521
Lethbridge *v.* Lethbridge ... 162
—— *v.* Thurlow ..... 196
Lett *v.* Randall .....71, 193, 327
Leventhorpe *v.* Ashbie ... 203, 428
Leveridge, *In re* ..... 252
Leverington, *In b.* .....26, 27
Lewes' Trusts, *Re* ..... 512
Lewin *v.* Killey..... 320
Lewis, *In b.* ..... 45, 54
—— *In re* ..... 252
—— *v.* Lewis... 26, 28, 290, 291
—— *v.* Mathews ..... 231
—— *v.* Puxley ..... 230
Liddard *v.* Liddard ..... 224
Lightfoot *v.* Burstall .....209, 436
Lilford *v.* Powys-Keck ..... 58
Limerick, *In b.* ..... 18
Limpus *v.* Arnold..... 403
Lincoln *v.* Newcastle ..... 428
—— *v.* Windsor ..... 359
Lindsay *v.* Lindsay .....15, 32
Lister *v.* Smith..... 14
—— *v.* Tidd ..... 230
Littledale, *In b.* ..... 434
Livock, *In b.* ..... 50
Llewellyn's Trust, *In re*..... 280
Lloyd *v.* Branton.....393, 427
—— *v.* Davis ..... 57
—— *v.* Lloyd (L. R. 2 Eq. 722) ..... 455
—— *v.* —— (L. R. 7 Eq. 458)..... 160

PAGE

Lloyd *v.* Lloyd (2 Sim. N. S. 255)..... 392
—— *v.* Roberts ..... 22, 23, 25
Loch *v.* Venables ..... 369
Lockhart, *In b.*..... 17
Loffus *v.* Maw ..... 510
Loftus-Otway, *Re*..... 455
Lomax *v.* Lomax ..... 259
London, Bishop of *v.* Ffytche 480
—— and South Western Railway Co. *v.* Gomm ... 326
Long *v.* Blackall ..... 225, 226
—— *v.* Kent..... 469
—— *v.* Long ..... 259
—— *v.* Ovenden ..... 168
—— *v.* Watkinson ..... 226
Longchamp *v.* Fish ..... 19
Longdon *v.* Simson ..... 389
Lopez *v.* Burslem..... 529
Lord *v.* Colvin .....524, 525
—— *v.* Godfrey ..... 282
Loring *v.* Thomas ..... 322
Louch *v.* Peters ..... 251
Lovat *v.* Leeds..... 192, 196
Loveland, *In re*..... 236
Lowe, *In b.* ..... 443
—— *v.* Thomas ..... 232
Lowfield *v.* Stoneham..... 319
Lowman, *Re*.....320, 428
Lowndes *v.* Lowndes ..... 259
—— *v.* Norton ..... 193
Lowther *v.* Bentinck ..... 265
Luard *v.* Lane ..... 57
Lucas *v.* Goldsmid ..... 205
Lucena *v.* Lucena ..... 294
Luddy, *In re* ..... 320
Ludlow, *In b.* ..... 168
Luffman, *In b.* ..... 24, 40
Lugar *v.* Harman ..... 228, 251
Lumsden *v.* Fraser ..... 56
Lushington *v.* Onslow..... 51
Lyall *v.* Paton ..... 528
Lyddon *v.* Ellison..... 245
Lynch *v.* Bellew ..... 446
—— *v.* Paraguay ..... 527
Lyon *v.* Baker ..... 359
—— *v.* Home ..... 97
Lysaght *v.* Edwards..... ..... 483
Lywood *v.* Kimber ..... 230

M.

Maas *v.* Sheffield ..... 140
Mabbett, *In re* ..... 167
M'Cabe, *In b.* (L. R. 3 P. & D. 94) ..... 51

PAGE

M'Cabe, *In b.* (2 Sw. & Tr. 474) ..... 16
M'Cormick *v.* Garnett ..... 529
—— *v.* Simpson ..... 320
Macdonald *v.* Irvine ..... 281
Macduff, *Re* ..... 373
McGibbon *v.* Abbott ..... 11
Macgregor *v.* Macgregor ..... 295
Machu, *In re* ..... 241
Mackenzie *v.* Bradbury ..... 437
—— *v.* Mackenzie ..... 228
—— *v.* Yeo ..... 25
Mackett *v.* Mackett ..... 225
Mackie *v.* Mackie ..... 284
Maclaren *v.* Stainton 369, 471, 493
Macleay, *In re* ..... 241
McLeod *v.* McNab ..... 435
M'Leroth *v.* Bacon ..... 205
M'Murdo, *In b.* ..... 30, 31
Macpherson *v.* Macpherson 257, 280
Macreight, *In re* ..... 522
M'Vicar, *In b.* ..... 39
Maden *v.* Taylor ..... 295
Maddick *v.* Marks ..... 66
Maddison *v.* Chapman ..... 435
Maddock, *In b.* ..... 27
Maher *v.* Linigan ..... 403
Main, *In b.* ..... 512
Major *v.* Williams ..... 53
Malcolmson *v.* Malcolmson 72, 74
Malen, *In b.* ..... 85
Maley, *In b.* ..... 43
Malim *v.* Keighley ..... 225
Mallabar *v.* Mallabar ..... 207
Maltass *v.* Maltass ...523, 526, 528
Manchee *v.* Kay ..... 136
Manchester, &c. Railway Company, *In re* ..... 55
Mann, *In b.* ..... 83
—— *v.* Thompson ..... 249
Manning *v.* Purcell ...50, 136, 274
Mannox *v.* Greener .....72, 457
Manser, *In re* ..... 373
Mansergh *v.* Campbell ..... 194
Mansfield, *In b.* ..... 21
Manson *v.* Baillie ..... 359
Manton *v.* Tabois .....165, 464
March, *In re* ..... 206
Marchant, *In b.* ..... 17
Marcus, *In re* ..... 252
Margary *v.* Robin .....26, 83
Mariot *v.* Kinsman .....92, 140
Marlborough *v.* Godolphin... 92, 140
Marrett, *Re* ..... 526
Marriott *v.* Abell ..... 296

PAGE

Marsden, *In b.* ..... 12
—— *v.* Kent ..... 507
Marsh, *Re* ..... 66
—— *v.* Marsh .....26, 52
Marshall *v.* Broadhurst ..... 357
—— *v.* Gingell .....74, 538
—— *v.* Holloway .....390, 447
Martelli *v.* Holloway ..... 429
Martin, *In b.* ..... 92
—— *In re* ..... 39
—— *v.* Glover ..... 376
—— *v.* Hobson ..... 234
—— *v.* Holgate ..... 224
—— *v.* Lee ..... 11
—— *v.* Margham .....240, 372
—— *v.* Martin .....258, 478
Mason, *In re* ('91, 3 Ch. 467) 391
—— —— ('03, A. C. 1)... 64
—— *v.* Bateson .....16, 239
—— *v.* Mason ..... 319
—— *v.* Robinson ..... 195
Mason's Will, *In re* ..... 78
Mathews *v.* Keble ..... 390
—— *v.* Mathews .....275, 276
Matthew *v.* Osborne ..... 159
Matthews *v.* Greenman ..... 450
Maugham *v.* Mason ..... 208
—— *v.* Vincent ..... 318
Maunder, *In re* ..... 224
Maxwell *v.* Hyslop ..... 291
May, *In b.* ..... 440
—— *v.* Bennett ..... 195
—— *v.* May ..... 31
Mayd, *In b.* ..... 15
Mayhew, *In re* ..... 70
Mayott *v.* Mayott ..... 204
Mead, *In b.* ..... 26
Meatyard, *In b.* ..... 527
Medlock, *Re* .....168, 181
Medlycott *v.* Jortin ..... 119
Medworth *v.* Pope ..... 237
Meek *v.* Devenish ..... 129
Megarey, *In b.* ..... 434
Megson *v.* Hindle ..... 238
Meinertzhagen *v.* Walters ... 402
Meluish *v.* Milton .....14, 240
Melville, *In b.* ..... 443
Mendes *v.* Mendes ..... 261
Mercer, *In b.* ..... 17
Meredith, *In b.* ..... 41
—— *v.* Farr ..... 238
Merrill *v.* Morton ..... 204
Merritt, *In b.* .....41, 71
Mervin, *In re* ..... 327
Meryon *v.* Collett .....227, 228
Metcalfe, *In re* ..... 322
—— *v.* Metcalfe ..... 455

PAGE

Metham *v.* Devon.....235, 236
Methuen and Blore, *In re* ... 160
Mette *v.* Mette ..... 530
Mexborough (Earl) *v.* Savile 226
Meyer, *In re* ..... 13
Meyrick *v.* Laws ..... 500
Michel's Trust, *Re* ..... 374
Michell *v.* Wilton..... 195
Micklethwait *v.* Micklethwait (1 De G. & J. 504) 192
Micklethwait *v.* Micklethwait (4 C. B. N. S. 790) 500
Middleton, *In b.* ..... 43
—— *In re* ..... 493
—— *v.* Losh ..... 391
Miles *v.* Harford .....325, 429, 500
—— *v.* Harrison..... 493
—— *v.* Jarvis ..... 247
—— *v.* Knight..... 245
—— *v.* Miles ..... 61
Miller *v.* Harris..... 261
—— *v.* Huddlestone..... 195
—— *v.* Travers ..... 450
—— *v.* Warren ..... 320
Milligan, *In b.* ..... 31
Millner's Estate, *In re* ..... 245
Mills, *In b.* ..... 51
—— *In re*..... 70
—— *v.* Drowitt ..... 195
—— *v.* Mills..... 233, 281
—— *v.* Millward .....44, 48
Millward, *In re*..... 326
Milman *v.* Lane ..... 230
Milne *v.* Gilbart ..... 229
Milner *v.* Harewood..... 8
Milsom *v.* Awdry ..... 293
Milsome *v.* Long ..... 166
Miltown *v.* Trench ..... 257
Miner *v.* Baldwin..... 195
Minter *v.* Wraith ..... 325
Mirehouse *v.* Rennell ..... 477
Mitchell, *In b.* .....36, 37
—— *Re* ..... 523
—— *v.* Thomas.....19, 96
Moase *v.* White..... 65
Mogg, *In b.* ..... 51
—— *v.* Mogg .....247, 249
Moir, *In re*..... 420
——'s Trusts, *In re* ..... 60
—— *v.* Warner..... 430
Mole *v.* Mole..... 258
Montagu, *In b.* ..... 40
—— *v.* Sandwich ...233, 234
Montague *v.* Beaulieu..... 427
—— *v.* Montague ..... 402
—— *v.* Sandwich (32 Ch. D. 525) 277

PAGE

Montefiore *v.* Enthoven ..... 240
—— *v.* Guedalla ..... 402
Montgomery, *In b.* ..... 12
Monypenny *v.* Dering.....325, 331, 332, 424
Moody, *In re*.....180, 258
Moor *v.* Raisbeck ..... 55
Moore, *In b.* ..... 22
—— *In re* (39 Ch. D. 116) 396
—— —— ('01, 1 Ch. 936) 389
—— *v.* Darton ..... 118
—— *v.* Frowd ..... 359
—— *v.* King .....21, 27
—— *v.* Moore (L. R. 18 Eq. 474)..... 118
—— *v.* —— (1 Bro. C. C. 127)..... 165
—— *v.* Petchell..... 203
—— *v.* Whitehouse ..... 47
Moorhouse *v.* Lord ..... 524
Morgan, *In b.* .....12, 40
—— *In re* ..... 194
—— *v.* Britten ..... 224
—— *v.* Gronow ..... 330
—— *v.* Holford ..... 3
—— *v.* Morgan ...280, 281, 389
—— *v.* Thomas ..... 61
Morice *v.* Durham ..... 374
Morley, *Re*..... 284
—— *v.* Bird..... 224
—— *v.* Rennoldson... 392, 394
Morrall *v.* Sutton..... 136
Morrell *v.* Morrell ..... 13
Morrice *v.* Aylmer .....57, 368
Morrieson, *In re* ..... 149
Morris *v.* Howes ..... 228
—— *v.* Morris ..... 73, 192
Morritt *v.* Douglas ..... 23
Mortimer, *In re* (54 L. J. Ch. 414)..... 295
—— —— (74 L. J. Ch. 745)..... 332
—— *v.* West ..... 239
Mortimore *v.* Mortimore ... 376
Morton, *Re* ..... 262
—— *In b.* (12 P. D. 141) 43
—— *In b.* (13 Jur. 1108) 48
Moses, *In re* .....57, 62
Moss *v.* Bardswell .. ..... 441
—— *v.* Barton..... 56
—— *v.* Harter .....66, 70
Mouflet *v.* Cc ..... 360
Mower *v.* Orr..... 79
Mowlem, *In re*..... 169
Muffet, *In re* ..... 232
Muggeridge's Trusts, *Re*..... 455
Mundy, *In b*..... 12

PAGE

Munro *v.* Munro ..... 524, 525
Munroe *v.* Douglas ..... 522
Murray, *In b.* ..... 18
Musgrave *v.* Brooke..... 420
Muskett *v.* Eaton..... 248
Mussoorie Bank *v.* Raynor... 225
Musther, *In re* ..... 322
Mustow, *In b.* ..... 26
Myers *v.* Washbrook ..... 386
Mytton *v.* Mytton ..... 62

N.

Neate *v.* Pickard .....51, 54, 435
Nelson, *In b.* .....50, 51
—— *v.* Callow ..... 333
—— *v.* Page..... 289, 291
Nettleton *v.* Stephenson..... 390
Nevill, *In re* ..... 292
—— *v.* Boddam ..... 296
Neville, *In b.*..... 31
—— *v.* Fortescue ..... 282
Nevin *v.* Drysdale ..... 402
Nevinson *v.* Lennard ..... 233
New *v.* Jones..... 359
Newbolt *v.* Pryce..... 450
Newman, *In b.* ..... 22
—— *v.* Bateson ..... 260
—— *v.* Newman 233, 248, 327
Newmarch, *In re* ..... 292
Newns, *In b.*..... 14
Newton *v.* Ayscough ..... 296
—— *v.* Clarke..... 22
—— *v.* Marsden..... 394
—— *v.* Newton ..... 54
Newton's Trusts, *In re* ..... 230
Nicholl *v.* Nicholl ..... 332
Nicholls, *In b.* ..... 512
—— *v.* Judson ..... 274
Nichols *v.* Binns ..... 93
—— *v.* Hawkes ..... 71, 193
Nicholson *v.* Nicholson ..... 369
Nicolls *v.* Sheffield ..... 326
Nightingale, *In re* ..... 376
—— *v.* Goulburn ... 374
Nisbett *v.* Murray ..... 166
Nixon *v.* Verry..... 455
Noding *v.* Alliston ..... 25
Noel *v.* Henley ..... 206, 207
—— *v.* Jones..... 258
Norrington, *In re* ..... 284
Norris, *In b.* (1 Sw. & Tr. 6) 512
—— —— (3 No. Cas. 197) 30
—— *v.* Norris ..... 273
Northen *v.* Carnegie ..... 8

PAGE

Northumberland *v.* Aylesford 427
Norton *v.* Bazett ..... 22
—— *v.* Dashwood ..... 274
Nottage, *Re* ..... 373
Nourse, *In re*..... 393
Nugee *v.* Chapman ..... 166
Nunn's Trusts, *Re* ..... 450

O.

Oakes *v.* Oakes ..... 57
O'Bierne, *In re*..... 73
Occleston *v.* Fullalove..... 237
Oddie *v.* Woodford ..... 120
Odell *v.* Crone ..... 246
O'Donnell *v.* Walsh..... 162
Offiler, *In re* ..... 322
Ogilby, *In re* ..... 232
Ogle *v.* Knipe ..... 233, 234
—— *v.* Morgan..... 232
Oldfield, *In re* ..... 226
Olding, *In b.*..... 20
Oldroyd *v.* Harvey ..... 51
Olivant *v.* Wright..... 320
Olive *v.* Westerman..... 256
Oliver *v.* Brickland ..... 279
Ollive *v.* Weale..... 434
Olliver, *In b.* ..... 26
Olney *v.* Bates ..... 79
O'Loughlin, *In b.*..... 166
Olphert *v.* Olphert ..... 293
O'Mahoney *v.* Burdett ... 319, 320
Ommaney *v.* Bevan..... 319
—— *v.* Bingham ..... 523
—— *v.* Stilwell ..... 511
Onions *v.* Tyrer..... 43
Oppenheim, *In b.*..... 50
—— *v.* Henry..... 136
Orford *v.* Orford ..... 249
Orléans (Duchesse d'), *In b.* 523
Orton's Trust, *In re* ..... 224
Osborne, *In b.* ..... 528
Oswald, *In b.* ..... 13
Otley and Ilkley Railway, *In re*..... 58
O'Toole *v.* Browne ..... 59
Otway *v.* Sadleir ..... 38
Overhill's Trust, *In re*..... 239
Owen *v.* Bryant ..... 239
Owston, *In b.* ..... 20

P.

Page *v.* Donovan ..... 85
—— *v.* Leapinwell ..... 207
Paget *v.* Grenfell ..... 277

| | PAGE |
|---|---|
| Paget *v.* Haywood | 393 |
| Paget's Settled Estates, *In re* | 420 |
| Palmer, *In re* | 113, 209, 436 |
| —— *v.* Holford | 323 |
| —— *v.* Wakefield | 265 |
| Pankhurst *v.* Howell | 274, 403 |
| Panton *v.* Williams | 98 |
| Pardoe, *In re* | 375 |
| Parfitt *v.* Lawless | 97 |
| Park, *Re* | 440 |
| Parker, *In b.* | 32, 79 |
| —— *In re* (15 Ch. D. 528) | 205 |
| —— —— (17 Ch. D. 262) | 205 |
| —— —— ('97, 2 Ch. 208) | 235 |
| —— —— ('01, 1 Ch. 408) | 113, 209, 436 |
| —— *v.* Felgate | 98 |
| —— *v.* Marchant | 234 |
| —— *v.* Parker | 471 |
| Parker-Jervis, *In re* | 252 |
| Parkinson, *In re* | 205 |
| Parnall *v.* Parnall | 225 |
| Parnell, *In b.* | 261 |
| —— *v.* Lyon | 394 |
| Parnham's Trusts, *Re* | 455 |
| Parr, *In b.* | 50 |
| Parry and Daggs, *In re* | 423 |
| Parsons *v.* Baker | 225 |
| Partridge *v.* Partridge | 422 |
| Patch *v.* Shore | 12, 67 |
| Paton *v.* Sheppard | 273 |
| Patten, *In b.* | 523 |
| —— *v.* Poulton | 46 |
| Patterson, *In b.* | 31 |
| —— *In re* | 118 |
| Paul *v.* Children | 235 |
| —— *v.* Compton | 249 |
| Payne *v.* Trappes | 54 |
| Peach, *In b.* | 84 |
| Peacock's Estate, *Re* | 402 |
| Peacock *v.* Stockford | 251 |
| Pearce *v.* Carrington | 250 |
| —— *v.* Graham | 78 |
| Peareth *v.* Marriott | 196 |
| Pearks *v.* Moseley | 327, 328 |
| Pearn, *In b.* | 83 |
| Pearson *v.* Helliwell | 195 |
| —— *v.* Pearson | 23, 256, 257 |
| —— *v.* Spencer | 158 |
| Pease *v.* Pattinson | 373 |
| Pechell *v.* Hilderley | 531 |
| Peck, *In b.* | 511 |
| Peckham *v.* Peckham | 261 |
| Pedley *v.* Dodds | 162 |
| Pegg *v.* Wisden | 56 |
| Peillon *v.* Brooking | 527 |
| Pelham-Clinton *v.* Newcastle (Duke) | 394, 424 |
| Pellew *v.* Horsford | 273 |
| Pembroke, *In b.* | 18 |
| Pembrooke *v.* Friend | 290 |
| Pennant *v.* Kingscote | 25 |
| Penny *v.* Penny | 493 |
| —— *v.* Turner | 475 |
| Penrice *v.* Penrice | 76 |
| Penton *v.* Robart | 404 |
| Pepin *v.* Bruyère | 519 |
| Perceval *v.* Perceval | 247 |
| Percy, *In re* | 423 |
| Perera *v.* Perera | 98 |
| Perrin *v.* Lyon | 392, 394 |
| Perry's Executors *v.* The Queen | 78 |
| Petchell, *In b.* | 40 |
| Peters *v.* Lewes, &c. Rail. Co. | 333 |
| Pettinger *v.* Ambler | 66 |
| Petty *v.* Wilson | 234 |
| Peverett, *In b.* | 24 |
| Peyton's Settlement Trust, *In re* | 430 |
| Phelps, *In b.* | 433 |
| Phene's Trusts, *Re* | 512 |
| Pheysey *v.* Vicary | 158 |
| Phillips, *In re* | 66 |
| —— *v.* Beal | 160, 386 |
| —— *v.* Cayley | 66 |
| —— *v.* Gutteridge | 195 |
| —— *v.* Phillips | 208 |
| Philpot, *In b.* | 22 |
| Philpott *v.* St. George's Hosp. | 370 |
| Philp's Will, *In re* | 376 |
| Philps *v.* Evans | 376 |
| Phipps, *In b.* | 30 |
| —— *v.* Hale | 28 |
| Picard *v.* Mitchell | 195 |
| Pickering *v.* Pickering | 282 |
| Pickersgill *v.* Grey | 8, 203 |
| —— *v.* Rodger | 79 |
| Pickup *v.* Atkinson | 282 |
| Pickwick *v.* Gibbes | 258 |
| Pidgely *v.* Pidgely | 70 |
| Pierce *v.* Att.-Gen. | 61 |
| —— *v.* Harrison | 61 |
| Piercy, *In b.* | 22 |
| —— *v.* Roberts | 241 |
| Pigg *v.* Clarke | 205 |
| Pilkington's Trusts, *In re* | 57 |
| Pilkington *v.* Gray | 95 |
| Pimm, *In re* | 252 |
| Pinchin *v.* Simms | 275 |
| Pinede's Settlement, *In re* | 68 |
| Pinhorne, *In re* | 79 |
| Piper *v.* Piper | 289 |

| | PAGE |
|---|---|
| Pitcairn, *In re* | 284 |
| Pitcairne *v.* Brase | 450 |
| Pitt *v.* Jackson | 332 |
| Pitts, *In re* | 240 |
| Platel *v.* Stert | 24 |
| Platt *v.* Att.-Gen. N. S. W. | 525 |
| Playne *v.* Scriven | 27 |
| Plenty *v.* West | 23, 40 |
| Plumbe *v.* Neild | 369 |
| Polden *v.* Bastard | 159 |
| Pole *v.* Somers | 277 |
| Pollard *v.* Doyle | 359 |
| Pollock, *In re* | 402 |
| —— *v.* Pollock | 187 |
| Pomfret *v.* Perring | 71 |
| Pooley, *In re* | 36, 359 |
| Poor *v.* Mial | 424 |
| Pope, *In re* | 390 |
| —— *v.* Whitcombe | 296 |
| Portal & Lamb, *In re* | 58 |
| Portarlington *v.* Damer | 457 |
| Porter, *In b.* | 14 |
| —— *In re* | 456 |
| —— *v.* Tournay | 166 |
| Portland *v.* Prodgers | 92 |
| Potinger *v.* Wightman | 521 |
| Potter's Trust, *In re* | 322 |
| Potter *v.* Baker | 193 |
| —— *v.* Richards | 392 |
| Pouey *v.* Hordern | 526 |
| Poulet *v.* Poulet | 394 |
| Powell, *In b.* | 20, 85 |
| —— *In re* | 79, 246 |
| ——'s Trust, *In re* | 66, 234, 329 |
| —— *v.* Boggis | 230 |
| —— *v.* Powell | 53 |
| —— *v.* Rawle | 422 |
| Power *v.* Hayne | 167 |
| —— *v.* Power | 289 |
| Powis *v.* Capron | 333 |
| Powys *v.* Mansfield | 259, 402, 403 |
| Prater, *In re* | 165 |
| Pratt, *Re* | 62 |
| —— *v.* Harvey | 371 |
| —— *v.* Mathew | 235, 237, 239, 318 |
| Prendergast, *In b.* | 31 |
| Presant *v.* Goodwin | 167 |
| Prescott *v.* Barker | 65 |
| Press *v.* Parker | 164 |
| Preston *v.* Melville | 529 |
| Prevost *v.* Clarke | 225 |
| Price, *In re* (28 Ch. D. 709) | 10, 57 |
| —— —— ('00, 1 Ch. 422) | 526 |
| —— *v.* Dewhurst | 510 |
| —— *v.* Hall | 247 |
| —— *v.* Parker | 60 |
| Price *v.* Powell | 45 |
| —— *v.* Strange | 226, 227, 228 |
| Prichard *v.* Prichard | 234 |
| Priestley *v.* Holgate | 427 |
| Pringle, *In re* | 235 |
| Prinsep *v.* Dyce Sombre | 93 |
| Pritchard *v.* Arbouin | 370 |
| Proctor *v.* Bath and Wells | 325, 328 |
| Prothero, *In b.* | 398 |
| Pryor *v.* Pryor | 26 |
| Puddephatt, *In b.* | 84 |
| Pulling *v.* Reddy | 394 |
| Purser *v.* Darby | 483 |
| Pye, *Ex parte* | 277, 401, 403 |
| Pyle, *Re* | 56 |
| Pym *v.* Lockyer | 401 |


## Q.


| | |
|---|---|
| Quihampton *v.* Going | 18 |
| Quincey *v.* Quincey | 54 |


## R.


| | |
|---|---|
| Rabbeth *v.* Squire | 471 |
| Radcliffe, *In re* | 450 |
| —— *v.* Buckley | 204 |
| Raffenel, *In b.* | 526 |
| Ralph *v.* Carrick | 437 |
| Ramsay *v.* Shelmerdine | 113 |
| Randall *v.* Russell | 386 |
| Randfield *v.* Randfield | 36 |
| Ranelagh *v.* Melton | 56 |
| —— *v.* Ranelagh | 293 |
| Ranking's Trusts, *Re* | 376 |
| Rattenberry, *In re* | 274 |
| Raven *v.* Waite | 259, 260 |
| Ravensworth, *In re* | 232 |
| Rawlings *v.* Jennings | 166 |
| Rawlins *v.* Goldfrap | 88 |
| —— *v.* Powell | 275, 401 |
| —— *v.* Rawlins | 250, 258 |
| Rawlinson, *In re* | 297 |
| —— *v.* Rawlinson | 273 |
| Rayner, *In re* | 234 |
| Reach *v.* Kennegal | 274 |
| Read *v.* Stedman | 226 |
| Reade, *In b.* | 17, 54 |
| Reay, *In b.* | 140 |
| —— *v.* Rawlinson | 71 |
| Redding, *In b.* | 20, 27 |
| Redfern, *In re* | 437 |
| Reece *v.* Pressey | 98 |
| Reed, *In re* | 203 |

| | PAGE |
|---|---|
| Rees, *In re* | 376, 403 |
| —— *v.* Rees | 48 |
| Reeve, *In b.* | 50 |
| ——'s Trusts, *In re* | 232 |
| Reeves *v.* Baker | 65, 225 |
| Regan, *In b.* | 22 |
| Reg. *v.* Garland | 4 |
| —— *v.* Price | 448 |
| —— *v.* Saffron Walden | 360 |
| —— *v.* Scammonden | 521 |
| —— *v.* Selborne | 521 |
| —— *v.* Stephenson | 448 |
| —— *v.* Wilson | 159 |
| —— *v.* Wymondham | 318 |
| Reid, *In b.* | 533 |
| —— *v.* Hoare | 500 |
| —— *v.* Reid | 10 |
| Renaud *v.* Tourangeau | 240 |
| Rendle, *In b.* | 16 |
| Rex *v.* Hay | 511 |
| —— *v.* Lytchet Matraverse | 522 |
| —— *v.* Oundle | 159 |
| —— *v.* Rotherfield Greys | 521 |
| —— *v.* Walpole St. Peter's | 521 |
| —— *v.* Wilmington | 521 |
| —— *v.* Woburn | 521 |
| Reynish *v.* Martin | 393, 394 |
| Reynolds, *In b.* | 435 |
| —— *Re* | 66 |
| —— *v.* Kortright | 528 |
| —— *v.* Wright | 8 |
| Rhoades, *Re* | 209 |
| Rhodes, *In re* | 512 |
| —— *v.* Rhodes | 13 |
| —— *v.* Whitehead | 247 |
| Rich *v.* Sanders | 161 |
| Richards, *In re* | 259 |
| —— *v.* Queen's Proctor | 40 |
| —— *v.* Richards | 169 |
| Richardson, *Ex parte* | 357, 358 |
| —— *In re* | 332 |
| —— *v.* Elphinstone, | 274, 275, 276 |
| —— *v.* Greese | 275, 276 |
| —— *v.* Richardson | 376 |
| Richerson, *In re* | 269 |
| Rickard *v.* Robson | 372 |
| Ricketts *v.* Turquand | 165 |
| Rider *v.* Wager | 321 |
| Ridgway *v.* Woodhouse | 207, 424 |
| Ridley, *In re* | 326 |
| —— *v.* Ridley | 511 |
| Riley *v.* Garnett | 248 |
| Rimington *v.* Cannon | 326 |
| Ring *v.* Hardwick | 330 |
| Ringrose *v.* Bramham | 249 |
| Ripley, *In b.* | 21, 49 |
| Rippon, *In b.* | 531 |
| Rishton *v.* Cobb | 395 |
| River's Case | 236 |
| Roach *v.* Garvan | 261 |
| Robarts, *In b.* | 40 |
| Robbins, *In re* | 167 |
| Roberts, *In re* (30 Ch. D. 234) | 79, 230, 322, 330 |
| —— ——('03, 2 Ch. 200) | 226 |
| —— *v.* Edwards | 369 |
| —— *v.* Kuffin | 165 |
| —— *v.* Phillips | 23, 28 |
| —— *v.* Roberts | 15 |
| —— *v.* Walker | 207 |
| Robertson *v.* Fraser | 224 |
| —— *v.* Powell | 435 |
| —— *v.* Richardson | 455 |
| —— *v.* Smith | 12 |
| Robinson, *In b.* | 13, 15 |
| —— *In re* | 421 |
| —— *v.* Clarke | 40 |
| —— *v.* Comyns | 424 |
| —— *v.* Hardcastle | 324, 329, 332 |
| —— *v.* Lowater | 537, 539, 540 |
| —— *v.* Ommanney | 394 |
| —— *v.* Shepherd | 392 |
| —— *v.* Smith | 227 |
| —— *v.* Wheelwright | 244, 425 |
| Robson, *In re* | 165 |
| Roby, *In re* | 227 |
| Roch *v.* Callen | 438 |
| Rochford *v.* Hackman | 240 |
| Rochfort *v.* Fitzmaurice | 396 |
| Rodhouse *v.* Mold | 291 |
| Rogers *v.* Goodenough | 16 |
| —— *v.* Mutch | 249 |
| —— *v.* Soutten | 260 |
| Rogerson, *In re* | 373 |
| Rolfe *v.* Perry | 289, 290 |
| Rolls *v.* Pearce | 118 |
| Rook *v.* Att.-Gen. | 229 |
| Rooke *v.* Langdon | 46 |
| Roome *v.* Roome | 402, 403 |
| Roose, *In re* | 404 |
| Rootes, *In re* | 230 |
| Roper's Estate, *In re* | 295 |
| Rose *v.* Bartlett | 114, 387 |
| —— *v.* Hill | 296 |
| Rosher, *In re* | 423 |
| Ross's Trust, *In re* | 243 |
| —— *v.* Borer | 194 |
| —— *v.* Ross | 241 |
| Rossiter, *In re* | 292 |
| Rosslyn's Trust, *Re* | 389 |
| Roundel *v.* Currer | 424 |
| Rous *v.* Jackson | 329 |

PAGE
Routledge *v.* Dorril.....329, 332
Rowe *v.* Rowe .....278, 282
Rowland *v.* Morgan.....428, 496
Rowley *v.* Merlin ..... 51
Royle *v.* Harris.....83, 85
Rubbins, *In re* ..... 223
Rucker *v.* Scholefield .....330, 493
Rudge *v.* Winnall..... 404
Rushout, *In b.* ..... 50
Russell, *In b.*..... 39
—— *In re*..... 330
—— *v.* Chell ..... 54
—— *v.* Dickson ..... 438
—— *v.* Russell (12 Ir. Ch. Rep. 377)..... 69
—— *v.* Russell ('03, 1 Ir. Rep. 168) ..... 180
—— *v.* St. Aubyn ..... 277
—— *v.* Watts ..... 159
Rutter, *In re*..... 394
Ruttinger *v.* Temple ..... 88
Ryall *v.* Hannam..... 450
Ryder, *In b.* ..... 37
Rymer, *Re*..... 372
Ryton, *In b.* ..... 443

S.

Sabin *v.* Heape..... 537
Sackville *v.* Symth ..... 290
Sackville-West *v.* Holmesdale.....396, 428, 496
Sadler *v.* Rickards ..... 196
Salaman, *In re* ..... 250
Salisbury's Case ..... 394
—— *v.* Salisbury..... 278
Salmon *v.* Vaux ..... 425
Salt *v.* Chattaway ..... 208
Saltmarsh *v.* Barrett ..... 227
Salusbury *v.* Denton ..... 205
Sampson, *Re*..... 455
—— & Wall, *In re* ..... 127
Samuel *v.* Samuel..... 455
Sander's Trusts, *In re*..... 318
Sanderson *v.* Bayley..... 205
Sandford *v.* Raikes ..... 137
Sanford, *In re* ..... 423
—— *v.* Irby ..... 162
Sargent *v.* Roberts ..... 168
Sartoris's Estate, *In re* ..... 466
Satterthwaite *v.* Powell ..... 511
Saunders, *In b.*..... 31
—— *v.* Saunders..... 46
Saunderson's Trust, *Re* ..... 358
—— *v.* Dobson..... 160
Savage, *In b.*..... 45
PAGE
Savage *v.* Carroll ..... 277
—— *v.* Robertson ..... 238
Savory, *In b.*.....20, 27
Sawtell, *In b.*..... 443
Sax, *Re* ..... 423
Saxton *v.* Saxton .....54, 61
Sayer *v.* Bradly..... 230
Sayer's Trusts, *In re* .....245, 331
Scammell *v.* Wilkinson ..... 139
Scarborough, *In re* ..... 273
—— *v.* Savile ..... 421
Scarisbrick *v.* Skelmersdale 389
Scarsdale *v.* Curzon..... 428
Schnadhorst, *In re* ..... 320
Schofield *v.* Heap..... 402
Scholefield *v.* Templer..... 97
Schott, *In b.* ..... 13
Schweder's Estate, *In re*..... 274
Scott, *In b.* ..... 31
—— *In re*..... 402
—— *v.* Harwood..... 248
—— *v.* Jones ..... 203
—— *v.* Key ..... 260
—— *v.* Moore ..... 229
—— *v.* Scott ..... 43
—— *v.* Tyler .....393, 396
Scouler *v.* Plowright ..... 98
Scriven *v.* Sandom ..... 66
Scrutton *v.* Pattillo..... 511
Seal, *In re*..... 164
Sealy, *In re* ..... 252
Seaton *v.* Seaton ..... 127
Selby *v.* Whittaker ..... 224
Semphill *v.* Bayley ..... 392
Sergeant, *In re*..... 318
Seton-Smith, *In re* .....165, 274
Sewell's Estate, *In re*..... 282
—— *v.* Crewe-Read..... 371
Seymor's Case ..... 202
Seymour's Trusts, *In re*..... 228
Shadforth *v.* Temple ..... 56
Shaftesbury's Case ..... 261
Sharland, *Re* ..... 232
Sharman, *In b.*..... 86
Sharp *v.* Cosserat..... 241
—— *v.* Lush ..... 493
—— *v.* St. Sauveur ..... 2, 91
Sharpe *v.* Crispin.....522, 523
Shaw, *In b.* ..... 47
—— *v.* Borrer.....536, 537, 540
—— *v.* Ford..... 423
—— *v.* Lawless ..... 131
—— *v.* M'Mahon .....113, 250
—— *v.* Neville .....20, 23
—— *v.* Rhodes ..... 389
—— *v.* Thorne ..... 42
Shea *v.* Boschetti..... 49

PAGE
Sheldon, *In re* ..... 283
—— *v.* Sheldon.....17, 18
Shelford *v.* Acland ..... 69
Shelley *v.* Shelley .....428, 496
Shelton *v.* Watson ..... 397
Sheppard, *Re*..... 8
—— *v.* Sheppard..... 195
Sherratt *v.* Mountford..... 204
Sheward, *Re* ..... 456
Shield *v.* Shield .....24, 25
Shirt *v.* Westby ..... 257
Shovelton *v.* Shovelton ..... 225
Shrewsbury *v.* Hornby ..... 374
Shuttleworth *v.* Murray..... 500
Sibthorp, *In b.* ..... 18
Sidebotham *v.* Watson ..... 441
Sidney, *In re* ..... 373
—— *v.* Sidney ..... 60
Silcox *v.* Bell..... 204
Simmonds, *In b.* .....21, 27
Simmons *v.* Rudall ..... 48
—— *v.* Pitt ..... 390
Simonin *v.* Mallac ..... 530
Simpson, *In b.* ..... 45
—— *v.* Foxon ..... 40
—— *v.* Vickers 425, 426, 427
Singleton *v.* Tomlinson ...16, 160
Sisson *v.* Giles ..... 129
Sitwell *v.* Bernard ..... 280
Skair, *In b.* ..... 18
Skinner *v.* Ogle..... 78
Skirving *v.* Williams ..... 282
Slade *v.* Fooks ..... 204
—— *v.* Parr..... 295
Slaney *v.* Watney..... 231
Slark *v.* Dakyns .....328, 330, 467
Slater, *In re* ..... 59
Sleeman *v.* Wilson ..... 261
Slinn, *In b.* ..... 12
Smart, *In b.* ..... 17
Smartt, *In b.* ..... 17
Smee *v.* Smee ..... 94
Smilter, *In re* ..... 238
Smith, *In b.* (2 Cur. 796) ... 433
—— —— (L. R. 1 P. & D. 717) 14
—— —— (1 No. Cas. 315) 43
—— —— (2 Rob. 335)..... 81
—— —— (1 Sw. & Tr. 127) 92
—— —— (2 Sw. & Tr. 508) 511
—— —— (3 Sw. & Tr. 589) 49
—— *In re* (33 Ch. D. 195) 290
—— —— (35 Ch. D. 558) 204
—— —— (45 Ch. D. 632) 59
—— —— (2 J. & H. 594) 437, 439
——'s Trusts, *In re* ..... 224
—— *v.* Adkins ..... 29
PAGE
Smith *v.* Barneby .....226, 228
—— *v.* Butcher..... 230
—— *v.* Charles ..... 239
—— *v.* Claxton ..... 269
—— *v.* Conder ..... 403
—— *v.* Cowdery ..... 395
—— *v.* Cunningham..... 435
—— *v.* Evans..... 21
—— *v.* Harris ..... 21
—— *v.* Horlock..... 296
—— *v.* Lidiard ..... 204
—— *v.* Osborne..... 294
—— *v.* Palmer ..... 376
—— *v.* Ridgway .....159, 162
—— *v.* Shelton ..... 97
—— *v.* Smith (3 Gif. 263) 275
—— *v.* —— (L. R. 5 Ch. 342) ..... 327
—— *v.* —— (L. R. 1 P. & D. 143)...20, 83
—— *v.* —— (8 Sim. 353) 322
—— *v.* Tebbitt ..... 94
Smyth *v.* Smyth .....161, 166, 167
Smythies, *In re* .....274, 402
Snook *v.* Watts..... 93
Snow *v.* Teed..... 206
Soar *v.* Dolman..... 50
Somerville *v.* Somerville 521, 522, 524
Sotheran *v.* Dening.....41, 42
Sotheron, *In b.* ..... 18
Sottomaior, *Re* ..... 522
Sottomayer *v.* De Barros ... 529
South Molton *v.* Att.-Gen.... 167
Southall *v.* Jones ..... 67
Sparkes *v.* Cator ..... 277
Sparling *v.* Parker ..... 282
Speakman, *In re* ..... 322
Spence *v.* Spence ..... 74
Spencer *v.* Scurr ..... 193
—— *v.* Wilson ..... 207
Sperling, *In b.* ..... 26
Spiller *v.* Maude ..... 373
Spinks *v.* Robins ..... 402
Spooner's Trust, *In re*..... 67
Spratt, *In b.* ..... 15
Sprigge *v.* Sprigge ..... 44
Springett *v.* Jenings ..... 64
Springfield, *Re* ..... 376, 438
Spurway *v.* Glynn ..... 257
Stackpole *v.* Beaumont ..... 393
Staines *v.* Stewart ..... 49
Stamford *v.* Hobart..... 119, 496
—— *v.* White ..... 44
Standen *v.* Standen..... 237, 449
Stanes *v.* Parker ..... 359
Stanhope's Trusts, *Re*... 250, 475

PAGE

Staniland *v.* Staniland ..... 260
Stanley *v.* Coulthurst..... 397
Stansfield *v.* Stansfield ..... 79
Stead *v.* Mellor..... 225
—— *v.* Platt ..... 248
Stedham, *In b.* ..... 440
Steel, *In re* ..... 164
Steele, *In b.* ..... 440
Steer, *Re* ..... 442, 528
Steevens' Trusts, *Re* ..... 230
Stelfox *v.* Sugden..... 195
Stent *v.* Robinson ..... 255
Stephens, *In re*..... 246, 391
—— *v.* Taprell ..... 42
Stephenson, *Re* ..... 450
Stert *v.* Platel ..... 230
Stevenson *v.* Abington ..... 204
—— *v.* Masson..... 402, 525
Stewart, *In b.* ..... 18, 434
—— *v.* Stewart..... 403
Stillman *v.* Weedon..... 67
Stockdale *v.* Nicholson... 228, 229
Stockil *v.* Punshon ..... 434
Stocks *v.* Barré..... 167, 234
—— *v.* Dodsley..... 227
Stockwell *v.* Ritherdon .....15, 46
Stoddart *v.* Grant..... 40
—— *v.* Nelson ..... 204
Stokes *v.* Cheek..... 167
—— *v.* Heron..... 194
—— *v.* Salomons ..... 59, 160
—— *v.* Stokes ..... 531
Stone *v.* Greening..... 65, 164
—— *v.* Hoskins ..... 510
Storer *v.* Prestage ..... 197
Storrs *v.* Benbow ..... 249
Storry *v.* Walsh ..... 540
Stratheden and Campbell, *Re* ..... 324, 373
Straus *v.* Goldsmid ..... 374
Streatley, *In b.* ..... 23, 28
Stretch *v.* Watkins ..... 258
Stride *v.* Sandford ..... 53
Strong *v.* Bird ..... 445
Stroud *v.* Gwyer ..... 284
Stroughill *v.* Anstey..... 536
Struthers *v.* Struthers..... 61
Stuart *v.* Bute (9 H. L. C. 440)..... 521
—— *v.* —— (11 Ves. 657) 165
—— *v.* Cockerell..... 331
—— *v.* Moore ..... 521
Stubs *v.* Stubs ..... 420
Stulz *v.* Schœffle ..... 97
Stump *v.* Gaby ..... 3, 17
Sturge *v.* Great Western Rail. Co. ..... 376

PAGE

Sturton *v.* Whetlock ..... 51
Suffield *v.* Brown..... 159
Sudeley and Baines & Co., *Re* ..... 334
Sugden *v.* St. Leonards ... 47, 543
Suisse *v.* Lowther..... 438
Summers, *In b.*.....21, 23
Sunderland, *In b.*..... 16
Sutherland, *In b.*..... 81
—— *v.* Cooke ..... 281
Sutton, *In re* ..... 233, 374
—— *v.* Sutton ..... 1
—— *v.* Sadler ..... 93
—— *v.* Sharp ..... 166
Swain, *In re* ..... 372
Swaine *v* Kennerley..... 239
Swansea Bank *v.* Thomas ... 187
Sweeting *v.* Prideaux ..... 437
Sweetland *v.* Sweetland.....28, 82
Swete *v.* Pidsley ..... 17
Swinburne, *In re* ..... 70
Swinfen *v.* Swinfen..... 165
Sykes, *In b.* ..... 49
——'s Trust, *In re* ..... 242
—— *v.* Sykes ..... 326
Symes *v.* Green..... 94

T.

Taaffe *v.* Conmee ..... 296
Tagart *v.* Hooper..... 433
Taite *v.* Swinstead ..... 333
Talbot *v.* Shrewsbury..... 274, 277
Taltarum's Case ..... 202
Tamplin, *In b.* ..... 18
Tanqueray - Willaume and Landau, *Re*..... 536, 537
Tarrant's Trusts, *Re* ..... 66
Tatham *v.* Drummond ... 256, 438
Tatnall *v.* Hankey ..... 526
Taylor, *In b.*..... 28, 434
—— *In re* (34 Ch. D. 255) 204
—— —— ('01, 2 Ch. 134) 168
——'s Estate, *In re* ..... 403
—— *v.* Clark ..... 280
—— *v.* Haygarth..... 227
—— *v.* Horde ..... 260
—— *v.* Mead ..... 29, 139
—— *v.* Popham ..... 426
—— *v.* Richardson ..... 16
—— *v.* Taylor (L. R. 17 Eq. 324) 195
—— *v.* —— (3 D. M. & G. 190) 208
Teague's Settlement, *In re*... 326
Teape's Trusts, *In re* ..... 70

PAGE
Tegg, *In b.* ..... 51
Tempest *v.* Tempest..... 36, 274
Tench *v.* Cheese ..... 389
Tennent *v.* Tennent..... 397
Terrible, *In b.* .....54, 433
Terry's Will, *In re* ..... 205
Tetlow *v.* Ashton ..... 230
Tewart *v.* Lawson..... 390
Thacker *v.* Key ..... 278
Tharp's Estate, *In re* ..... 294
Thatcher's Trusts, *In re*..... 324
Thellusson *v.* Rendlesham... 120, 230
—— *v.* Roberts ... 120, 230
—— *v.* Woodford...120, 401
Thomas, *In b.* .....24, 28
—— *In re* ..... 283
—— *v.* Att.-Gen. ..... 256
—— *v.* Howell ..... 424
—— *v.* Jones..... 9, 58, 61, 66
—— *v.* Thomas (27 Beav. 537) ...233, 260
—— *v.* —— (14 Sim. 234)..... 328
—— *v.* —— (87 L. T. 58) ..... 325
—— *v.* Wilberforce ..... 324
Thompson, *In b.* ..... 32
—— 's Trusts, *In re* 230, 322
—— *v.* Andrews ..... 357
—— *v.* Bell ..... 292
—— *v.* Fisher ..... 396
—— *v.* Lawley..... 387
—— *v.* Robinson ..... 204
—— *v.* Thompson ..... 296
Thomson, *In b.*..... 22
—— *v.* Advocate-General ..... 528
—— *v.* Eastwood..... 237
—— *v.* Hempenstall ... 54
Thorley, *In re* ..... 358
Thorncroft *v.* Lashmar ..... 12
Thorne, *In b.*..... 30
—— *v.* Rooke ..... 432
Thornton, *In b.* (2 Cur. 913) 44
—— —— (14 P. D. 82) 44
—— *v.* Thornton ..... 70
Thorpe *v.* Bestwick ..... 36
—— *v.* Thorpe ..... 230
Throckmorton, *Re* ..... 455
Thrupp *v.* Collett ..... 232
Thursby *v.* Thursby..... 282
Thurston, *In re* ..... 68
Thynne *v.* Glengall..... 277
Tibbits *v.* Tibbits ..... 225
Tickner *v.* Old ..... 281
Timewell *v.* Perkins ..... 160, 166
PAGE
Toker, *In re* ..... 36
Tollemache *v.* Coventry... 328, 496
Tolson *v.* Collins..... 275, 277
Tookey, *In b.*..... 443
Toomer *v.* Sobinska..... 42, 433
Tootal's Trusts, *Re* ..... 519, 525
Topham, *In b.* ..... 84
Topping *v.* Howard ..... 226
Tovey, *In b.* .....16, 18
Townley, *In re* ..... 233
—— *v.* Bedwell .....55, 56
—— *v.* Sherborne ..... 377
—— *v.* Watson.....43, 50
Towns *v.* Wentworth ..... 118
Townsend, *In b.* ..... 49
—— 's Estate, *Re* ..... 37
—— *v.* Early ..... 249
—— *v.* Moore ..... 452
Townshend *v.* Windham..... 232
Towry's Settled Estate, *In re* 436
Tozer, *In b.* .....27, 45
Trappes *v.* Meredith ..... 455
Travers *v.* Blundell..... 163
—— *v.* Travers ..... 227
Treasury Solicitor *v.* Lewis 118
Treeby, *In b.*..... 52
Tregonwell *v.* Sydenham ... 206
Treloar *v.* Lean..... 48
Trevanion, *In b.* ..... 27
—— *v.* Vivian ..... 168
Trevelyan, *In re* ..... 292
Trevor *v.* Trevor ..... 397
Trew *v.* The Perpetual Trustee Co. ..... 477
Tribe *v.* Tribe ..... 22
Tricker *v.* Kingsbury ..... 392
Trimmell *v.* Fell ..... 60
Trinder *v.* Trinder ..... 59
Trott *v.* Buchanan ..... 457
—— *v.* Skidmore.....24, 27, 82
Trotter, *In re*..... 37
Troutbeck *v.* Boughey..... 139
Trower *v.* Butts ..... 250
Truffort, *In re* ..... 529
Truro, *In b.*..... 16
Trye *v.* Gloucester ..... 370
Tucker, *Re*..... 195
—— *v.* Boswell ..... 280
—— *v.* Kayess..... 209
Tuckey *v.* Henderson ..... 438
Tugwell *v.* Scott ..... 238
Tuite *v.* Bermingham ... 419, 500
Tulk *v.* Houlditch ..... 425, 427
Tullett *v.* Armstrong ..... 243
Turner, *In b.* (2 P. & D. 403) 45
—— —— (2 Sw. & Tr. 476) 511

PAGE

Turner, *Re* ..... 226, 437, 441
—— *v.* Brittain ..... 240
—— *v.* Buck ..... 257
—— *v.* Martin ..... 64, 276
—— *v.* Mullineux ..... 196
—— *v.* Newport,..... 257
—— *v.* Sargent ..... 397
—— *v.* Turner ..... 65, 259
—— *v.* Wright ..... 192
Turney, *In re* ..... 168
Turton *v.* Lambarde ..... 500
Tussaud's Estate, *In re* ..... 277
Tweedale, *In b.* ..... 31
—— *v.* Tweedale ... 395, 438
Twining *v.* Powell ..... 386
Tyler, *In re* ..... 373
—— *v.* Merchant Taylors Co. ..... 51
Tyrone *v.* Waterford ..... 166, 475
Tyrrell *v.* Painton ..... 19, 97
—— *v.* Tyrrell..... 256
Tytherleigh *v.* Harbin ..... 322

U.

Udny *v.* Udny 520, 524, 526, 530
Ullersperger, *In b.* ..... 21
Underwood *v.* Swain ..... 425
—— *v.* Wing ..... 319
United States *v.* Drummond 528
University College of North Wales *v.* Taylor ..... 16, 434
Unsworth *v.* Speakman ..... 79
Upfill *v.* Marshall ..... 53
Upton *v.* Brown ..... 318
Usticke, *In re* ..... 294

V.

Vachell *v.* Roberts ..... 282
Vaisey *v.* Reynolds ..... 404
Valdez's Trusts, *In re* ..... 227
Valpy, *In re* ..... 291
Vanderplank *v.* King ... 323, 332
Van Grutten *v.* Digby ..... 527
Van Hagan, *In re* ..... 63
Van Straubenzee *v.* Monck 16
Varlo *v.* Faden..... 390
Vaughan, *In re* ..... 373
—— *v.* Buck ..... 283
—— *v.* Burslem ..... 428
—— *v.* Clerk ..... 14
—— *v.* Vanderstegen... 89
Vaux *v.* Henderson..... 376
Vawdry *v.* Geddes ..... 324

PAGE

Velho *v.* Leite ..... 446
Venes *v.* Marriott ..... 232
Venn, *In re* ..... 250
Vernon, *In re* ..... 277
Vesey *v.* Vesey ..... 119, 436
Vezey *v.* Jamson ..... 374
Vicars *v.* Scott ..... 280
Vickers, *In re* (37 Ch. D. 525) 402
—— —— (81 L. T. 719) 62, 464
Vickery *v.* Evans ..... 194
Villar *v.* Gilbey ..... 250
Vincent *v.* Newcome ..... 281
Vine *v.* Raleigh ..... 391
Viner *v.* Francis..... 245, 251
Vinnicombe *v.* Butler..... 24
Von Buseck, *In b.* ..... 91
Von Brockdorff *v.* Malcolm 70, 329
Vynior's Case ..... 510

W.

Wade *v.* Hopkinson ..... 388
—— *v.* Nazer..... 53
Wade-Gery *v.* Handley ..... 169
Wagstaff, *In re* ..... 395
Wagstaffe *v.* Wagstaffe ..... 58
Wainwright, *In b.* ..... 511
—— *v.* Miller ..... 425
Wait, *In re* ..... 70, 121
Waite *v.* Combes ..... 234
—— *v.* Littlewood ..... 294
Wake *v.* Varah..... 294
Wakeham, *In b.* ..... 446
Walbran, *In re*..... 251
Walcot *v.* Botfield ..... 420
Waldo *v.* Waldo ..... 192
Walker, *Ex parte* ..... 56
—— *In b.* ..... 83
—— *Re* (L. R. 7 Ch. 120) 512
—— — ('97, 2 Ch. 238) 235
—— 's Estate, *In re* ..... 294
—— *v.* Banks ..... 69
—— *v.* Camden ..... 228
—— *v.* Main ..... 320, 322
—— *v.* Shore ..... 284
—— *v.* Smith ..... 97
—— *v.* Wetherell ..... 265
Wall, *In re* ..... 373
—— *v.* Bright..... 483
—— *v.* Wall ..... 196, 259
Wallace *v.* Anderson ..... 241
—— *v.* Pomfret ..... 276
Waller, *In re* ..... 450
Wallich, *In b.* ..... 446

| | PAGE |
|---|---|
| Wallis *v.* Crimes | 425 |
| —— *v.* Maughan | 96 |
| Walmesley *v.* Gerard | 500 |
| Walpole *v.* Cholmondeley | 90 |
| —— *v.* Orford | 510 |
| Walsh *v.* Gladstone | 374 |
| Walters *v.* Webb | 159 |
| Wand, *In re* 113, 209, | 436 |
| Warbrick *v.* Varley | 251 |
| Ward *v.* Grey | 475 |
| —— *v.* St. Paul | 261 |
| —— *v.* Turner | 118 |
| —— *v.* Wolverhampton | 56 |
| Warden, *In b.* | 22 |
| Wardle *v.* Brocklehurst | 158 |
| Ware, *In re* | 226 |
| —— *v.* Cann 241, | 242 |
| —— *v.* Rowland | 229 |
| Waring *v.* Coventry | 333 |
| —— *v.* Waring | 94 |
| Warner, *In b.* | 17 |
| —— *v.* Warner | 239 |
| Warren *v.* Postlethwaite | 23 |
| —— *v.* Rudall | 469 |
| —— *v.* Warren | 277 |
| Warrender, *In b.* | 434 |
| —— *v.* Warrender | 520 |
| Warrington *v.* Warrington | 206 |
| Waters, *In re* | 257 |
| —— *v.* Thorn | 97 |
| Wathen *v.* Smith 275, | 276 |
| Watkins, *In b.* | 434 |
| Watmough's Trusts, *Re* | 371 |
| Watson's Case | 242 |
| —— *v.* England | 511 |
| —— *v.* Watson | 402 |
| —— *v.* Young | 325 |
| Watt *v.* Wood | 391 |
| Watts *v.* Kelson | 159 |
| —— *v.* Watts | 55 |
| Wearmouth, &c. Co., *In re* | 187 |
| Webb, *In b.* | 12 |
| —— *v.* Byng | 58 |
| —— *v.* Grace | 392 |
| Webber *v.* Stanley | 162 |
| Webster's Estate, *Re* | 322 |
| —— *v.* Hale | 319 |
| Wedgwood *v.* Denton | 61 |
| Wedmore, *In re* | 275 |
| Weeding, *In re* | 57 |
| —— *v.* Weeding | 55 |
| Weekes' Settlement, *Re* | 438 |
| Weigall *v.* Brome | 387 |
| Weir *v.* Crum Brown | 375 |
| Weiss *v.* Dill | 359 |
| Welby *v.* Welby | 163 |
| Weld *v.* Bradbury | 246 |
| Wellesley *v.* Vere | 95 |
| —— *v.* Wellesley | 192 |
| Wells' Trusts, *Re* (42 Ch. D. 646) 39, | 60 |
| —— *In re* (53 Ch. D. 281) | 180 |
| —— *v.* Wells | 204 |
| Wenmoth's Estate, *In re* | 246 |
| Wentworth *v.* Humphrey | 4 |
| —— *v.* Wentworth | 280 |
| West, *Ex parte* | 295 |
| —— *v.* Lahing | 168 |
| —— *v.* Moore | 404 |
| —— *v.* Orr | 322 |
| —— *v.* Ray | 29 |
| —— *v.* Shuttleworth | 374 |
| Westfaling *v.* Westfaling | 477 |
| Weston, *In b.* | 49 |
| —— 's Settlement, *In re* | 70 |
| —— *v.* Collins | 56 |
| Wetherell *v.* Wetherell | 72 |
| Wharton *v.* Barker 376, | 461 |
| Whateley *v.* Spooner | 403 |
| Wheate *v.* Hall | 397 |
| Wheeldon *v.* Burrows | 159 |
| Wheeler, *In re* | 234 |
| —— *v.* Bingham 393, | 427 |
| —— *v.* Thomas | 61 |
| —— *v.* Warner | 394 |
| Whicker *v.* Hume 374, | 526 |
| Whitaker, *In re* | 198 |
| Whitbread *v.* St. John | 249 |
| Whitby *v.* Mitchell | 331 |
| Whitcomb *v.* Whitcomb | 520 |
| White, *In b.* 26, 27, 48, | 234 |
| —— *Re* 372, | 375 |
| —— 's Trusts, *Re* | 375 |
| —— *v.* Briggs 230, | 396 |
| —— *v.* Chitty | 455 |
| —— *v.* Lake | 252 |
| —— *v.* Repton | 30 |
| —— *v.* Summers | 247 |
| Whitehead, *Re* | 281 |
| —— *v.* Whitehead | 187 |
| Whitchorne, *In re* | 436 |
| Whiteley *v.* King | 46 |
| Whitelock *v.* Heddon | 250 |
| Whitfield *v.* Langdale | 164 |
| —— *v.* Prickett | 241 |
| —— 's Settlement, *In re* | 393 |
| Whiting *v.* Turner | 24 |
| Whitmore, *In re* | 79 |
| Whittaker, *In re* | 256 |
| Whitton *v.* Field | 319 |
| Whorwood, *Re* | 57 |
| Whyte *v.* Preston | 119 |
| —— *v.* Whyte | 438 |
| Widdow's Trusts, *In re* | 245 |

PAGE

Wigan *v.* Rowland ..... 36
Wilce *v.* Wilce ..... 161
Wilcocks' Settlement, *Re* ... 423
—— *v.* Wilcocks ... 278, 279
Wild's Case ..... 475
Wilday *v.* Barnett ..... 69
—— *v.* Sandys ..... 234
Wildes *v.* Davies ..... 231, 391
Wilford's Estate, *In re* ..... 510
Wilkins *v.* Hogg ..... 377
—— *v.* Jodrell..... 194, 273
Wilkinson, *In b.* (6 P. D. 100) 52
—— —— ('92, P. 227) 443
—— *In re* ..... 69
—— *v.* Adams ..... 236
—— *v.* Duncan ..... 328
—— *v.* Joughin ..... 240
—— *v.* Lindgren ..... 375
—— *v.* Schneider ..... 68
—— *v.* Wilkinson ..... 422
Wilks *v.* Bannister ..... 204
—— *v.* Groom ..... 251
Willatts, *In re* ..... 167, 438
Willesford, *In b.* ..... 17
Willetts *v.* Willetts ..... 293
Williams, *In b.*..... 82
—— *In re* (5 Ch. D. 735) ... 373
—— —— ('97, 2 Ch. 12)..... 226
—— (Esther), *In re* ... 70
—— *v.* Arkle ..... 227
—— *v.* Ashton .....48, 230
—— *v.* Dormer ..... 520
—— *v.* Goodtitle ..... 207
—— *v.* Jones.....47, 320
—— *v.* Kershaw..... 374
—— *v.* Knipe ..... 426
—— *v.* Lewis ..... 390
—— *v.* Owen ..... 58
—— *v.* Roberts ..... 227
—— *v.* Teale...323, 327, 330, 332
—— *v.* Tyley ..... 45
—— *v.* Williams ... 205, 225, 234, 436, 448
—— *v.* Wilson ..... 197
Williamson, *In re* ..... 471
—— *v.* Moore ..... 204
—— *v.* Naylor..... 203
Willing *v.* Baine..... 320, 322
Willis *v.* Curtois ..... 273
Willmott, *In b.*..... 85, 434
Willock *v.* Noble.....9, 10, 57, 140
Willoughby Osborne *v.* Holyoake..... 68
Wilmer's Trusts, *In re* ..... 250

PAGE

Wilmot, *Re* ..... 375
—— *v.* Wilmot ..... 294
Wilson, *In b.* (2 Cur. 854) ... 20
—— —— (L. R. 1 P. & D. 575)..... 27, 440
—— *In re* (24 Ch. D. 664) 392
—— —— ('07, 2 Ch. 572) 376
—— *v.* Atkinson ..... 239, 318
—— *v.* Bayly ..... 296
—— *v.* Beddard..... 20
—— *v.* Coles ..... 269
—— *v.* Duguid ..... 375
—— *v.* Eden ..... 64
—— *v.* O'Leary.....251, 438
—— *v.* Wilson ..... 389
Wilton *v.* Hill ..... 244
Winans *v.* Attorney-General 525
Windus *v.* Windus ..... 160
Wing *v.* Angrave ..... 511
Wingfield *v.* Wingfield ..... 230
Wingrove, *In b.* ..... 20, 51
—— *v.* Wingrove ..... 97
Winn, *In b.* ..... 15
Winter *v.* Winter..... 79
Winterton *v.* Crawfurd ..... 294
Wintle, *Re*..... 168
Wisden *v.* Wisden .....72, 78
Wise, *Re*..... 324
—— *v.* Piper ..... 397
Withy *v.* Mangles..... 229
Wollaston, *In b.* ..... 433
—— *v.* Berkeley ..... 511
—— *v.* King ..... 330
Wolley *v.* Jenkins..... 333
Wood, *In re* (32 Ch. D. 517) 403
—— —— ('94, 3 Ch. 381) 334
—— —— (83 L. T. 157)... 66
—— —— ('02, 2 Ch. 542) 236
—— *v.* Gaynon ..... 464
—— *v.* White..... 333
—— *v.* Wood ..... 53
Woodhouse *v.* Balfour..... 23
—— *v.* Herrick ..... 420
Woodhouselee *v.* Dalrymple 236
Woodin, *Re* .....168, 181
Woodington, *In b.* ..... 83
Woodley, *In b.*..... 84
Woodmeston *v.* Walker... 167, 243
Woods, *In b.*..... 443
—— *v.* Hyde ..... 56
—— *v.* Townley ..... 427
Woodward, *In b.* ..... 43
—— *v.* Glassbrook ... 295
—— *v.* Goulstone ...47, 49
Woolcombe *v.* Woolcombe... 166
Woolley, *In re* ..... 224
Woolrich, *In re* ..... 322

| | PAGE |
|---|---|
| Wordsworth *v.* Wood | 296 |
| Worley *v.* Worley | 440 |
| Worlidge *v.* Churchill | 295 |
| Wormald, *In re* | 456 |
| Worts *v.* Cubitt | 238 |
| Wotton, *In b.* | 85 |
| Wren *v.* Bradley | 396 |
| Wrench *v.* Murray | 98 |
| Wrey's Trust, *In re* | 29 |
| —— *v.* Smith | 282 |
| Wright, *In b.* | 82 |
| —— *In re* | 420 |
| —— 's Trusts, *Re* | 529 |
| —— *v.* Atkyns | 225 |
| —— *v.* Callender | 195 |
| —— *v.* Rogers | 25 |
| —— *v.* Rose | 56 |
| —— *v.* Row | 207 |
| —— *v.* Sanderson | 22, 24, 26 |
| —— *v.* Stephens | 319 |
| —— *v.* Tuckett | 368 |
| —— *v.* Wakeford | 21 |
| —— *v.* Wilkin | 424 |
| —— *v.* Wright | 243 |
| Wrightson, *In re* | 247 |
| Wrigley *v.* Sykes | 537, 540 |
| Wyatt, *In b.* | 51, 54 |
| Wyatt *v.* Berry | 21 |
| Wyche, *Re* | 359 |
| Wydown's Case | 260 |
| Wylde, *In re* | 206 |
| Wynch's Trusts, *Re* | 475 |
| —— *v.* Wynch | 259 |
| Wyndham *v.* Way | 404 |
| Wyndham *v.* Wyndham | 168 |
| Wynne *v.* Fletcher | 420 |


## Y.


| | PAGE |
|---|---|
| Yarrow *v.* Knightley | 75 |
| Yates, *In re* | 194 |
| —— *v.* Maddan | 71, 193 |
| —— *v.* Thomson | 437 |
| —— *v.* University College | 422 |
| —— *v.* Yates | 167, 196 |
| Yelverton *v.* Yelverton | 520, 523 |
| York *v.* Brown | 359 |
| Young *v.* Davies | 37 |
| —— *v.* Richards | 25 |
| —— *v.* Robertson | 296 |
| Younge *v.* Furse | 393 |
| Younghusband *v.* Gisborne | 240 |

# ABBREVIATIONS

*Used in this Volume in the References to the Reports of Cases.*

| | |
|---|---|
| A. & E..... | Adolphus & Ellis's King's Bench Reports (1834—40). |
| Add. ..... | Addams's Ecclesiastical Reports (1822—26). |
| Amb..... | Ambler's Chancery and Exchequer Reports (1737—83). |
| And. ..... | Anderson's Common Pleas Reports (1534—1605). |
| Anstr. ..... | Anstruther's Exchequer Reports (1792—97). |
| Atk. ..... | Atkyn's Chancery Reports (*temp.* Hardwicke, 1736—54). |
| B. & Ad. ..... | Barnewall & Adolphus's King's Bench Reports (1830—33). |
| B. & Al. ..... | Barnewall & Alderson's King's Bench Reports (1818—23). |
| B. & C..... | Barnewall & Creswell's King's Bench Reports (1823—30). |
| B. & P..... | Bosanquet & Puller's Common Pleas Reports (1796—1807). |
| B. & S..... | Best & Smith's Queen's Bench Reports (1861—69). |
| Ba. & Be..... | Ball & Beatty's Irish Chancery Reports (*temp.* Manners, 1807—14). |
| Barn. ..... | Barnardiston's Chancery Reports (*temp.* Hardwicke, 1740—41). |
| Be..... | Beavan's Reports of Cases in the Rolls Court (*temp.* Langdale & Romilly, 1838—66). |
| Bing..... | Bingham's Common Pleas Reports (1822—40). |
| H. Bl. ..... | H. Blackstone's Common Pleas & Exchequer Reports (1788—96). |
| W. Bl. ..... | W. Blackstone's King's Bench and Common Pleas Reports (1746—79). |
| Bli. ..... | Bligh's House of Lords' Reports (1819—21, 1827—37). |
| Br. & B. ..... | Broderip & Bingham's Common Pleas Reports (1819—22). |
| Br. C. ..... | W. Brown's Chancery Cases (*temp.* Thurlow & Loughborough, 1778—94). |
| Br. P. ..... | J. Brown's Cases in the High Court of Parliament (1751—1800). |
| Bur. ..... | Burrow's King's Bench Reports (*temp.* Mansfield, 1756—72). |
| C. B..... | Common Bench Reports in the Common Pleas (by Manning, Granger & Scott, 1845—65). |
| C. & F..... | Clark & Finnelly's House of Lords Cases (1831—46). |

| | |
|---|---|
| C. M. & R. ... | Crompton, Meeson, & Roscoe's Exchequer Reports (1834 -36). |
| Ca. t. Fin. ... | Chancery Reports (*temp.* Finch, 1673—80). |
| Ca. t. Talb. ... | Cases in Equity (*temp.* Talbot, 1734—37). |
| Car. & P. ..... | Carrington & Payne's Nisi Prius Cases (1823--41). |
| Ch. Cas. ..... | Cases in Chancery (1660—88). |
| Ch. Rep. ..... | Reports in Chancery (1625—1710). |
| Col. ..... | Collyer's Chancery Cases (*temp.* V. C. Knight Bruce, 1844—46). |
| G. Coop. ..... | Sir George Cooper's Chancery Cases (*temp.* Eldon, 1815). |
| Cowp. ..... | Cowper's King's Bench Reports (1774—78). |
| Cox ..... | Cox's Cases in Equity (1783—96). |
| Cr. & J. ..... | Crompton & Jervis's Exchequer Reports (1830—32). |
| Cr. & M. ..... | Crompton & Meeson's Exchequer Reports (1832—34). |
| Cr. & Ph. ..... | Craig & Phillips' Reports in Chancery (*temp.* Cottenham, 1840—41). |
| Cro. Eliz. .....<br>Cro. Jac .....<br>Cro. Car. ..... | Croke's King's Bench and Common Pleas Reports during the Reigns of Elizabeth, James I., and Charles I. (1582—1641). |
| Cur. ..... | Curteis's Ecclesiastical Reports (1834—44). |
| D. F. & J. ... | De Gex, Fisher, & Jones's Chancery Reports (*temp.* Campbell, Westbury, and Lords Justices Bruce and Turner, 1859—62). |
| D. J. & S..... | De Gex, Jones, & Smith's Chancery Reports (*temp.* Westbury, Cranworth, and Lords Justices Bruce and Turner, 1863—65). |
| D. M. & G. ... | De Gex, Macnaghten, & Gordon's Chancery Reports (*temp.* Truro, St. Leonards, Cranworth, and Lord Justices Cranworth, Bruce, Turner, 1851—57). |
| D. & Cl. ..... | Dow & Clark's House of Lords Cases (1827—32). |
| D. & Ry. ..... | Dowling and Ryland's Nisi Prius Cases (1822—23). |
| D. & Sw. ..... | Deane & Swabey's Ecclesiastical Reports (1854—57). |
| Dan. ..... | Daniell's Exchequer (Equity side) Reports (1817—20). |
| De G. ..... | De Gex's Bankruptcy Reports (1845—48). |
| De G. & J. ... | De Gex & Jones's Chancery Reports (*temp.* Cranworth, Chelmsford, and Campbell, and Lords Justices Bruce, and Turner, 1856—59). |
| De G. & S. ... | De Gex & Smale's Chancery Reports (*temp.* V. C. Knight Bruce, Parker, 1846—52). |
| Dick..... | Dickens's Reports in Chancery (1559—1798). |
| Doug. ..... | Douglas's King's Bench Reports (1779—85). |
| Dow..... | Dow's House of Lords Cases (1812—18). |
| Dr. & S. ..... | Drewry and Smale's Chancery Reports (*temp.* V. C. Kindersley, 1859—65). |
| Dr. & War. ... | Drury and Warren's Irish Chancery Reports (*temp.* Sugden, 1841—43). |
| Drew. ..... | Drewry's Chancery Reports (*temp.* V. C. Kindersley, 1852—59). |
| Dru. ..... | Drury's Irish Chancery Reports (*temp.* Sugden, 1843—44). |

| | |
|---|---|
| Dyer..... | Dyer's Reports (K. B., C. P., Ex., and Chan.), (1513—82). |
| E. & B..... | Ellis & Blackburn's Queen's Bench Reports (1852—58). |
| E. B. & E. ... | Ellis, Blackburn, & Ellis's Queen's Bench Reports (1858). |
| E. & E. ..... | Ellis & Ellis's Queen's Bench Reports (1858—61). |
| Ea. ..... | East's King's Bench Reports (1801—13). |
| Ecc. & Ad. Rep. | Ecclesiastical and Admiralty Reports by Spinks (1853—55). |
| Ed. ..... | Eden's Chancery Reports (*temp.* Northington, 1757—66). |
| Eq. Ca. Ab.... | Abridgment of Cases in Equity (*temp.* Somers, Harcourt, Cowper, Macclesfield, &c. down to middle of 18th Century). |
| Exch. ..... | Exchequer Reports (by Welsby, Hurlstone, & Gordon, 1847—57). |
| Fin. (Ca. t.)... | Chancery Reports (*temp.* Finch. 1673—80). |
| Gif. ..... | Giffard's Chancery Reports (*temp.* V. C. Stuart, 1857—65). |
| H. & C..... | Hurlstone & Coltman's Exchequer Reports (1862—65). |
| H. & M. ..... | Hemming & Miller's Chancery Reports (*temp.* V. C. Wood, 1862—65). |
| H. & N. ..... | Hurlstone and Norman's Exchequer Reports (1855—61). |
| H. L. C. ..... | House of Lords' Cases (by Clark, 1847—65). |
| Ha. ..... | Hare's Chancery Reports (*temp.* V. C. Wigram, Knight Bruce, Turner and Wood, 1841—53). |
| Hag. ..... ... | Haggard's Ecclesiastical Reports (1827—32). |
| Ir. C. L. Rep. | Irish Common Law Reports (1838—66). |
| Ir. Ch. Rep. | Irish Chancery Reports (1838—66). |
| Ir. Jur..... | The Irish Jurist. |
| J. & H..... | Johnson & Hemming's Chancery Reports (*temp.* V. C. Wood, 1860—62). |
| J. & L. ..... | Jones & Latouche's Irish Chancery Reports (*temp.* Sugden, 1844—46). |
| J. & W. ..... | Jacob & Walker's Chancery Reports (*temp.* Eldon, 1819—21). |
| Jac. ..... | Jacob's Chancery Reports (*temp.* Eldon, 1821—22). |
| Joh. ..... | Johnson's Chancery Reports (*temp.* V. C. Wood, 1858—59). |
| Jur. ..... | The Jurist (containing Reports of Cases in all the Courts, 1837—66). |
| K. & J. ... .. | Kay & Johnson's Chancery Reports (*temp.* V. C. Wood, 1854–58). |
| Kay ..... | Kay's Chancery Reports (*temp.* V. C. Wood, 1853—54). |
| Ke. ..... | Keen's Reports in the Rolls Court (*temp.* Langdale, 1836—39). |
| Kei. ..... . ... | Keilwey's Reports of Select Cases in the K. B. and C. P. (1278—1530). |
| L. J..... | The Law Journal Reports (containing Cases in all the Courts, from 1823). |

L. R. ..... The Law Reports (from 1865).
L. R., H. L., House of Lords, English and Irish Appeals.
,, Sc. App., House of Lords, Scotch Appeals.
,, P. C., Privy Council Appeals.
,, Ch., Chancery Appeals.
,, Eq., Equity Cases, before the M. R. and V.CC.
,, Q. B., Cases in the Court of Queen's Bench.
,, C. P., ,, ,, Common Pleas.
,, Exch., ,, ,, Exchequer.
,, P. & D., ,, ,, Probate.
,, App. Cas., House of Lords and Privy Council Appeals (from 1875).
Ch. D., Cases in the Chancery Division.
K. B., King's Bench Division (since 1901).
Q. B. D., Cases in the Queen's Bench Division.
P. D., Cases in the Probate Division.
[1891, &c.] Ch., K. B., Q. B., P., A. C.

L. T. ..... The Law Times Reports (containing Cases in all the Courts, from 1843).

Ld. Raym. ... Raymond's Reports of Cases in the K. B. and C. P. (1694—1732).

Leon. ..... Leonard's Reports of Cases in the Courts at Westminster (1540—1615).

Lev. ..... Levinz's King's Bench Reports (1660—97).

M. & C. ..... Mylne & Craig's Chancery Reports (*temp.* Cottenham, 1835—41).

M. D. & D. ... Montagu, Deacon, & De Gex's Cases in Bankruptcy (1840—44).

M. & Gr. ..... Manning & Granger's Common Pleas Reports (1840—45).

M. & K. ..... Mylne & Keen's Chancery Reports (*temp.* Brougham and Leach, M. R., 1832—35).

M. & M. ..... Moody & Malkin's Nisi Prius Cases (1826—30).

M. & S. ..... Maule & Selwyn's King's Bench Reports (1813—17).

M. & W. ..... Meeson & Welsby's Exchequer Reports (1836—47).

M'C. & Y. ... M'Cleland & Younge's Exchequer Reports (1825).

M'Cl..... ..... M'Cleland's Exchequer Reports (1824).

M'N. & G. ... Macnaghten & Gordon's Chancery Reports (*temp.* Cottenham, Truro, 1849—52).

Macq. ..... .. Macqueen's House of Lords Reports, Scotch Appeals (1851—65).

Mad. ..... Maddock's Chancery Reports (*temp.* V. C. E. Plumer, Leach, 1815—22).

Mer. ... ..... Merivale's Chancery Reports (*temp.* Eldon, 1815—17).

Milw. ..... Milward's Irish Ecclesiastical Reports (1819—43).

Mod. ..... Modern Reports, or Select Cases in the Courts of K. B., Ch., C. P. and Ex. (1660—1755).

Moll. ..... Molloy's Irish Chancery Reports (*temp.* Hart, 1826—30).

Moo. P. C. ... E. F. Moore's Privy Council Cases (1836—65).

Moo. & P. ... Moore and Payne's Common Pleas Reports (1827—30).

Moo. & S..... Moore & Scott's Common Pleas, Exchequer Chamber, and House of Lords Reports (1831—34).

| | |
|---|---|
| Mos. ..... | Moseley's Chancery Reports (*temp.* King, 1726—31). |
| N. R..... | The New Reports (containing Cases in all the Courts, 1862—65). |
| Nev. & M..... | Neville & Manning's King's Bench Reports (1832—36). |
| No. Cas. ..... | Notes of Cases in the Ecclesiastical Courts (1841—50). |
| P. W..... | Peere William's Chancery Reports (*temp.* Somers, Cowper, Harcourt, Macclesfield, King, Talbot, 1695—1736). |
| Ph. ..... | Phillips's Chancery Reports (*temp.* Lyndhurst, Cottenham, 1841—49). |
| Phillim. ..... | Phillimore's Ecclesiastical Reports (1809—21). |
| Plow. ..... | Plowden's Reports in the K. B., C. P. and Ex. (1551—78). |
| Pre. Ch. ..... | Precedents in Chancery, a Collection of Cases from 1689—1722. |
| Pri. ..... .. | Price's Exchequer Reports (1814—24). |
| Q. B. ..... | Queen's Bench Reports (by Adolphus and Ellis, 1841—52). |
| R. & M. ..... | Russell & Mylne's Chancery Reports (*temp.* Lyndhurst, Brougham, 1829—33). |
| P. P. & Conv. Cas. | Reports of Cases in the Law of Real Property and Conveyancing in all the Courts of Law and Equity published at the Law Times Office, 1843—48. |
| R. R..... | The Revised Reports. |
| Rep. ..... | Coke's Reports, K. B., C. P., Ex., and Chan. (1572—1616). |
| Rep. Ch. ..... | Reports in Chancery (1616—1712). |
| Rob. ..... | Robertson's Ecclesiastical Reports (1844—51). |
| Roll. Rep. ... | Rolle's King's Bench Reports (1615—25). |
| Rus. ..... | Russell's Chancery Reports (*temp.* Eldon, Lyndhurst, 1823—29). |
| S. & G. ..... | Smale & Giffard's Chancery Reports (*temp.* V. C. Stuart, 1852—57). |
| S. & S. ..... | Simons & Stuart's Chancery Reports (*temp.* V. C. E. Leach, 1822—26). |
| Salk. ..... ... .. | Salkeld's King's Bench Reports, with Special Cases in Chancery, C. P. and Exchequer (1689—1712). |
| Sc..... | Scott's Common Pleas Reports (1834—45). |
| Sch. & Lef. ... | Schoales & Lefroy's Irish Chancery Reports (*temp.* Redesdale, 1802—6). |
| Sim. ..... | Simons's Chancery Reports (*temp.* V. C. E. Leach, Hart, Shadwell, V.-C. Cranworth and Kindersley, 1826—52). |
| Stra. ... . ..... | Strange's Reports in Chancery, K. B., C. P., and Exch. (1715—48). |
| Sty. ..... | Style's Reports in the Upper Bench (1646—55). |
| Sw. ..... | Swanston's Chancery Reports (*temp.* Eldon, 1818—19). |
| Sw. & Tr..... | Swabey & Tristram's Probate and Divorce Court Reports (1858—65). |
| T. R..... | Term Reports in the King's Bench (by Durnford & East, 1785—1800). |

| | |
|---|---|
| T. & R. | Turner & Russell's Chancery Reports (*temp.* Eldon, 1822—24). |
| Talb. (Ca. t.) | Cases in Equity (*temp.* Talbot, 1734—37). |
| Tau. | Taunton's Reports of Cases in the C. P. and other Courts (1808—19). |
| Toth. | Tothill's Chancery Reports (1558—1649). |
| V. & B. | Vesey & Beames's Reports in Chancery (*temp.* Eldon, 1812—14). |
| Ven. | Ventris's Reports in the King's Bench and Common Pleas (1669—92). |
| Ver. | Vernon's Chancery Cases (*temp.* Finch, North, Jeffreys, Somers, Cowper, Harcourt, Macclesfield, 1680—1718). |
| Ves. S. | Vesey (senior), Reports in Chancery (*temp.* Hardwicke, 1746—55). |
| Ves. J. | Vesey (junior), Reports in Chancery (*temp.* Thurlow |
| Ves. | Loughborough, Eldon, 1789—1817). |
| W. N. | The Weekly Notes (of the Law Reports). |
| W. R. | The Weekly Reporter (containing Cases in all the Courts, from 1852). |
| Wils. | Wilson's Reports in King's Bench and Common Pleas (1742—74). |
| Y. & C. | Younge & Collyer's Chancery Reports (*temp.* V. C. Knight Bruce, 1841—44). |
| Y. & C. Ex. | Younge & Collyer's Exchequer (Equity) Reports (*temp.* Lyndhurst, Abinger, 1833—1842). |
| Y. & J. | Younge & Jervis's Exchequer Reports (1826—30). |
| Yelv. | Yelverton's King's Bench Reports (1602—12). |
| You. | Younge's Exchequer (Equity) Reports (*temp.* Lyndhurst, 1830—32). |

# ABBREVIATIONS

*Used in this Volume in the Citation of Text-Books.*

| | |
|---|---|
| Amos & Ferard, Fixtures | Amos & Ferard's Treatise on the Law of Fixtures; 3rd ed., 1883. |
| Bl. Comm. | Sir William Blackstone's Commentaries on the Laws of England; 16th ed., by Coleridge, 1825. |
| Broom, Maxims | Broom's Selection of Legal Maxims; 7th ed., 1900. |
| Burn, Ecc. L. | Burn's Ecclesiastical Law; by Phillimore, 1873. |
| Burt. Comp. | Burton's Compendium of the Law of Real Property; 8th ed., by Cooper, 1855. |
| Byth. Jarm. | Bythewood & Jarman's Selection of Precedents, forming a System of Conveyancing; 4th ed., 1884—90. |
| Clayton, Elem. of Conv. | Clayton's Elements of Conveyancing; 1855. |
| Cod. Nap. | Code Napoléon. |
| Co. Litt. | Coke's Commentary upon Littleton; 19th ed., by Butler, 1832. |
| Com. Dig. | Comyn's Digest of the Laws of England; 5th ed., by Hammond, 1822. |
| Cr. Dig. | Cruise's Digest of the Laws of England respecting Real Property; 4th ed., by White, 1835. |
| Dart, V. & P. | Dart's Compendium of the Law and Practice of Vendors and Purchasers of Real Estate; 7th ed., 1905. |
| Dav. Conv. | Davidson's Precedents and Forms in Conveyancing; 18th ed., 1904. |
| Dav. Mart. | Davidson's Martin's Practice of Conveyancing, with Forms of Conveyancing. |
| Deane, Wills | Deane's Act for the Amendment of the Laws with respect to Wills; 1852. |
| Dibb | Dibb's Practical Guide to the Registration of Deeds and Wills in the West Riding of Yorkshire; 1846. |
| Dicey, Conflict of Laws | Dicey, A. V., on the Conflict of Laws; 2nd ed., 1908. |
| Farwell, Pow. | Farwell's Concise Treatise on Power; 2nd ed., 1893. |

| | |
|---|---|
| Fearne ..... | Fearne's Essay on Contingent Remainders and Executory Devises; 10th ed., by J. W. Smith, 1844. |
| Fearne, Posth. ..... | Fearne's Posthumous Works; edited by Shadwell, 1796. |
| Gale, Easements ..... | Gale's Treatise on Easements; 8th ed., 1908. |
| Gilb. Ten. ..... | Gilbert's Law of Tenures; 5th ed., by Watkins & Vidal, 1824. |
| Gilb. Uses ..... ..... | Gilbert's Law of Uses and Trusts; 3rd ed., by Sugden, 1811. |
| Godolph..... | Godolphin's Orphan's Legacy; 4th ed., 1701. |
| Hanson ..... | Hanson on the Probate, Legacy, and Succession Duty Acts; 5th ed., 1904. |
| Hawkins, Constr. Wills. | Hawkins' Concise Treatise on the Construction of Wills; 1863. |
| Hayes, Conv..... | Hayes' Introduction to Conveyancing; 5th ed., 1840. |
| Hayes, Lim. to Heirs in Tail | Hayes' Essay on the Construction of Limitations to Heirs in Tail; 1829. |
| Hill, Trustees ..... | Hill's Treatise on the Law relating to Trustees, 1845. |
| Inst. ..... | Justiniani Institutiones (with English Introduction, Translation and Notes, by Sandars, 11th ed., 1905). |
| Jarm. Wills ..... | Jarman's Treatise on Wills; 5th ed., 1893. |
| L. C. Eq. ... ..... | Leading Cases in Equity, by White & Tudor; 7th ed., 1897. |
| L. C. R. P..... | Leading Cases on Real Property, by Tudor; 4th ed., 1898. |
| Lewin, Trusts ..... | Lewin's Treatise on the Law of Trusts and Trustees; 11th ed., 1904. |
| Lewis, Perpet. ..... | Lewis's Treatise on the Law of Perpetuity, 1843; Supplement thereto, 1849. |
| Mart. Conv. Recital Book. | Martin's Conveyancer's Recital Book; 1834. |
| Peachey, Settlements ... | Peachey's Treatise on the Law of Marriage and other Family Settlements; 1860. |
| Perk. ..... ..... | Perkins's Conveyancing; a profitable Book, treating on the Laws of England principally as they relate to Conveyancing; 15th ed., by Greening, 1827. |
| Phil. Dom..... | R. Phillimore's Law of Domicil; 1847. |
| Phil. Prin. Jurisp..... | J. G. Phillimore's Principles of Jurisprudence. |
| Pow. Dev. by Jarm..... | Powell's Essay on Devises; 3rd ed., by Jarman, 1827. |
| R. P. Com. Rep. ..... ... | Real Property Commissioners' Reports; 1830. |
| Roll. Ab..... ..... | Rolle's Abridgment; 1668. |
| Rop Leg. ..... | Roper's Treatise on the Law of Legacies; 4th ed., by White, 1847. |

| | |
|---|---|
| Sand. Uses | Sanders' Essay on Uses and Trusts; 5th ed., by G. W. Sanders & Warner, 1844. |
| Scriv. Cop. | Scriven's Treatise on Copyhold, Customary Freehold and Ancient Demesne Tenure; 7th ed., 1896. |
| Shelf. Mortm. | Shelford's Treatise on the Law of Mortmain; 1836. |
| Shep. Touch. | Sheppard's Touchstone of Common Assurances; 7th ed., by Preston, 1820. |
| Smith, L. C. | Smith's (J. W.) Leading Cases on various Branches of the Law; 11th ed., 1903. |
| Ste. Com. | Stephen's Commentaries on the Laws of England, founded on Blackstone; 15th ed., 1908. |
| Ste. Evid. | Stephen (Sir J. F.) Digest of the Law of Evidence; 8th. ed., 1907. |
| Sto. Conf. Laws | Story's Commentaries on the Conflict of Laws; 8th ed. |
| Sugd. Gilb. Uses | Sugden's Gilbert on Uses and Trusts; 3rd ed., 1811. |
| Sugd. Pow. | Sugden's Treatise on Powers; 8th ed., 1861. |
| Sugd. R. P. Stat. | Sugden's Essay on the Real Property Statutes; 2nd ed., 1862. |
| Sugd. V. & P. | Sugden's Treatise on the Law of Vendors and Purchasers of Estates; 14th ed., 1862. |
| H. Sugd. Wills | Henry Sugden's Essay on the Law of Wills; 1837. |
| Sweet, Conc. Pr. | Sweet's Concise Precedents in Conveyancing; 4th ed., 1886. |
| Sweet, Stat. Conv. 8 & 9 Vict. | Sweet's Statutes relating to Conveyancing of the Session 8 & 9 Victoriæ, 1845. (A supplement to the Concise Precedents.) |
| Sweet, Wills | Sweet's Statute of Wills; 1838. |
| Swinb. | Swinburne on Testaments and Last Wills; 7th ed., by Powell, 1803. |
| Taylor, Evidence | J. Pitt Taylor's Treatise on the Law of Evidence; 10th ed., 1906. |
| Taylor, Med. Jurisp. | A. S. Taylor's Manual of Medical Jurisprudence; 5th ed., 1905. |
| Theobald, Const. Wills. | Theobald, Treatise on the Construction of Wills; 7th ed., 1908. |
| Toll. Exors. | Toller's Law of Executors and Administrators; 7th ed., by Whitmarsh, 1838. |
| Trevor, Succession | Trevor's Taxes on Succession; 4th ed., by Freeth & Wallace, 1881. |
| Tud. L. C. R. P. | Tudor's Leading Cases on Real Property; 4th ed., 1898. |
| Vin. Ab. | Viner's General Abridgment of Law and Equity; 2nd ed., 1791–94. Supplement to, 1799–1806. |

| | |
|---|---|
| Walker, Partition ..... | Walker (W. G.), The Partition Acts, 1868 & 1876; a Manual of the Law of Partition and of Sale in lieu of Partition; 2nd ed., 1882. |
| Watk. Cop. .. ..... | Watkin's Treatise on Copyholds; 4th ed., by Coventry, 1825. |
| Westlake, Intern. Law. | Westlake's Treatise on Private International Law, or the Conflict of Laws; 4th ed., 1905. |
| Wh. & Tud. L. C. Eq.... | White & Tudor's Leading Cases in Equity; 7th ed., 1897. |
| Wigram, Extr. Evidence. | Wigram's Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in aid of the interpretation of Wills; 4th ed., 1858. |
| Wms. Exors. ..... | Williams' (Sir E. V.) Treatise on the Law of Executors and Administrators; 10th ed., 1905. |
| Wms. Real Assets ..... | Williams' (Joshua) Essay on Real Assets; 1861. |
| J. Williams, R. P. ..... | Williams' (Joshua) Principles of the Law of Real Property; 21st ed., 1910. |
| Yool, Waste ..... | Yool's Essay on Waste, Nuisance, and Trespass; 1863. |

# THE WILLS ACT.

## 1 VICT. CHAP. 26.

*An Act for the Amendment of the Laws with respect to Wills.* [3rd July, 1837.]

EXPLANATION OF TERMS.

Meaning of certain words in this Act (*a*)

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled and by the authority of the same, That the words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say), the word "will" shall extend to a testament and to a codicil and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of an Act passed in the twelfth year of the reign of King Charles the Second intituled "An Act for taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles

"Will:"

(*a*) The marginal notes to the sections of the Act are not in all cases identical with the marginal notes printed by the King's printer. The latter form no part of the statute, and are not binding as an explanation or construction of the sections, *Claydon* v. *Green*, L. R. 3 C. P. 511; 37 L. J. C. P. 226; 18 L. T. 607; *Sutton* v. *Sutton*, 22 Ch. D. 511; 52 L. J. Ch. 383; 48 L. T. 95.

Marginal notes.

§ 1. the Second intituled "An Act for taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service," and to any other testamentary disposition; and

"Real estate:" the words "real estate" shall extend to manors advowsons messuages lands tithes rents and hereditaments, whether freehold customary freehold tenant right customary or copyhold or of any other tenure, and whether corporeal incorporeal or personal, and to any undivided share thereof, and to any estate right or interest (other than a chattel

"Personal estate:" interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys shares of government and other funds securities for money (not being real estates) debts choses in action rights credits goods and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the

Number. singular number only shall extend and be applied to several persons or things as well as one person or thing; and every

Gender. word importing the masculine gender only shall extend and be applied to a female as well as a male.

REPEAL CLAUSE.

II. [Repealed by 37 & 38 Vict. c. 35.]

GENERAL ENABLING CLAUSE.

All property may be disposed of by will.

III. And be it further enacted, That it shall be lawful for every person (*b*) to devise bequeath or dispose of, by

Alien, or person domiciled abroad.

(*b*) The subject of the wills of aliens and of British subjects domiciled abroad is treated of in the second Appendix, to which the reader is referred for fuller information.

The following points as to aliens may be briefly noted here:—

By the Naturalization Act, 1870 (33 Vict. c. 14), s. 2, "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect" [*i.e.* shall not validate or invalidate, *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; 41 L. J. Ch. 576; 26 L. T. 142] "any estate or interest in real or

§ 3.

his will executed in manner hereinafter required, all real estate and all personal estate (*c*) which he shall be entitled to, either at law or in equity (*d*), at the time of his death, and which, if not so devised bequeathed or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor (*e*),

As to the execution of a will, so as to exclude the lord's title by escheat for want of heirs,

---

personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the Act, or in pursuance of any devolution by law on the death of any person dying before the Act."

Notwithstanding the above enactment, however, the will of a foreigner dying domiciled abroad will not be admitted to probate in the United Kingdom, nor have any operation upon movable property in the United Kingdom, although such will may be executed in accordance with the provisions of the Wills Act, unless it is validly executed according to the requirements of the law of the testator's domicile, *In b. Buseck*, 6 P. D. 211; 51 L. J. P. 9; *Bloxam* v. *Favre*, 9 P. D. 130; 53 L. J. P. 26; 50 L. T. 766.

The validity of a will dealing with immovable property situate in the United Kingdom, by whomsoever made, and wheresoever executed, is wholly governed by the ordinary testamentary law of that part of the United Kingdom in which such immovable property is situate; Dicey, Conflict of Law, 500. It is to be observed that the distinction is not between *real* property and *personal* property, but between *movable* property and *immovable* property. Leaseholds are *immovables*.

(*c*) By this section the practice is not altered with respect to suing at law upon a chose in action bequeathed to a legatee; see *Bromage* v. *Lloyd*, 1 Ex. 32; 16 L. J. Ex. 257; and *Bishop* v. *Curtis*, 17 Jur. 23; 18 Q. B. 878; 21 L. J. Q. B. 391; in which cases it was held that the specific legatee of a promissory note, though the executors assent to the bequest, cannot sue upon the note. The executors only are entitled to sue.

Legatee of chose in action sues in name of executor.

(*d*) A person in possession of land without other title has a devisable interest, *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 13 L. T. 254. A purchaser who has made, but not signed, a contract for the purchase of real estate, the terms of which are proved, and which is signed by the vendor, has a devisable interest in that estate, *Morgan* v. *Holford*, 1 S. & G. 101. And a person who has sold and conveyed an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable, *Gresley* v. *Mousley*, 4 De G. & J. 78. See also *Stump* v. *Gaby*, 2 D. M. & G. 623; 22 L. J. Ch. 352; 95 R. R. 257.

What interests devisable.

(*e*) The section of the Statute of Frauds which required the execution of a will of freehold estate to be attested by three or four witnesses, was with other Acts repealed by sect. 2, "except so far as the same Acts

§ 3.

or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*f*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will or otherwise could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or surrender to the use of a will should continue in force for a limited time only or any other special custom, could not have been disposed of by will according to the power contained in this Act if this Act had not been made;

comprising customary freeholds and copyholds,

without surrender and before admittance;

also such of them as could not be devised before the Act.

relate to any wills to which this Act does not extend;" and sect. 3 applies only to the devise of property which, if not so devised, would devolve upon the heir-at-law or customary heir of the testator or his ancestor, or upon the executor or administrator of the testator. Upon the construction of these clauses it was doubted whether, in the case of a testator dying without heirs, it would not, to prevent an escheat to the lord, be necessary that the will should be executed pursuant to the old law. But see now *Wentworth* v. *Humphrey*, 11 App. Cas. 619; 55 L. J. P. C. 66; 55 L. T. 532.

Copyholds.

(*f*) The effect of this section is to enable a copyholder in every case to devise his estate without a surrender to the use of his will; and to defeat his widow's right to freebench, *Lacey* v. *Hill*, L. R. 19 Eq. 346; 44 L. J. Ch. 215; 32 L. T. 48; but the estate remains in the customary heir until the admittance of the devisee. Consequently, where a copyholder devised to trustees, who did not disclaim, but tendered for admittance the customary heir, whom the lord refused to admit on account of the devise, though the Court would not grant a mandamus to compel the lord to admit the heir, *Reg.* v. *Garland*, L. R. 5 Q. B. 269; 39 L. J. Q. B. 86; 22 L. T. 160; yet the lord having refused to admit the heir could not seize for want of a tenant, *Garland* v. *Mead*, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179; 24 L. T. 421.

See further as to devises of copyholds, note to section V.

Dower.

By the Dower Act, 3 & 4 Will. IV. c. 105, s. 4, it is enacted that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will. The Act does not apply to any woman married before the passing of the Act; but its application must now be obsolete.

§ 3.

and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold customary freehold tenant right customary or copyhold or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent (*g*) executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken and other rights of entry; and also to such of the same estates interests and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*h*).

Estates *pur autre vie.*

Contingent interests.

Rights of entry;

and property acquired after execution of the will.

FEES ON COPYHOLDS.

IV. Provided always and be it further enacted, That where any real estate of the nature of customary freehold or tenant right or customary or copyhold might by the custom of the manor of which the same is holden have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting registering

As to the fees and fines payable by devisees of customary and copyhold estates.

(*g*) Under both the old and the present law a contingent fee under a shifting clause is devisable, even though the contingency happen after the death of the testator, and is of such a nature that he, personally, could never have derived any benefit from it, *Ingilby* v. *Amcotts*, 21 Be. 585; 25 L. J. Ch. 769.

Contingent estates.

(*h*) Compare section 24, and the note thereto.

§ 4. or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator; Provided also that where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto have surrendered the same to the use of his will and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties fees fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting registering or enrolling such surrender, had the testator been duly admitted to such real estate and afterwards surrendered the same to the use of his will; all which stamp duties fees fine or sums of money due as aforesaid shall be paid in addition to the stamp duties fees fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLDS.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right or customary or copyhold shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such

§ 5.

will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine heriot dues duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate; and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine heriot dues duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent (*i*).

and the lord to be entitled to the same fine, &c., when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

VI. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary

Estates *pur autre vie.*

(*i*) In devising copyholds for sale, the better course is to give to the trustees or executors a power to sell the copyholds, and not to devise the copyholds to the trustees or executors upon trust for sale. If power is given to the trustees or executors to sell, the purchaser will be entitled to be admitted without paying a double set of fees and fines, whereas if the copyholds are devised to the trustees or executors upon trust to sell them, one set of fees and fines is payable in respect of their admission, and another set by the purchaser upon his admission.

So in the case of a beneficial devise of copyholds, it is better to give the person intended to be benefited a power of appointment over them with a devise to him in default of appointment, rather than to devise them to him *simpliciter*. If he is given a power of appointment, then, if he is minded to sell them, he can do so without being compelled to take admittance and to pay the fees and fines incident thereto, and if he is not so minded, he can be admitted in respect of the estate devised to him in default of appointment.

This subject is referred to again briefly in the notes to Precedent V. The question of the right of the lord to fines has been discussed in a large number of cases, but the Editor considers that this topic belongs rather to the subject of "Copyholds" than "Wills," and the reader is therefore referred for further information to any of the standard text-books on copyhold tenure.

§ 6. freehold tenant right customary or copyhold or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*k*).

AGE OF TESTATOR.

No will of a person under age valid;

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid (*l*).

Estates *pur autre vie*, where a special occupant, though named, never comes into existence.

(*k*) Under this section the legal personal representative of the deceased owner of estates *pur autre vie* is entitled to those estates, not only in the case where no special occupant is named in the limitations, but also in the case where a special occupant is named but never comes into existence. See *Reynolds* v. *Wright*, 2 D. F. & J. 590; 30 L. J. Ch. 381; 3 L. T. 531; in which case the devise was of leaseholds for lives to trustees, in trust for "A. and his heirs:" A. died intestate and illegitimate; and it was held that the leaseholds belonged to the administrator of A., and not beneficially to the devisees in trust. There may be a special occupant of an equitable estate *pur autre vie* as well as of a legal estate, *Reynolds* v. *Wright*, *ubi supra*. See also as to estates *pur autre vie*, *Northen* v. *Carnegie*, 4 Drew. 587; 28 L. J. Ch. 930; *Pickersgill* v. *Grey*, 30 Be. 352; 31 L. J. Ch. 394; 5 L. T. 706; *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. Ch. 255; 26 L. T. 267; *Milner* v. *Harewood*, 18 Ves. 259, 273; *Re Sheppard*, '97, 2 Ch. 67; 66 L. J. Ch. 445; 76 L. T. 756.

(*l*) A will made by an infant does not become operative by his subsequently attaining his majority; Sugd. R. P. Stat. 330. This section deprived an infant of the power which he formerly enjoyed of appointing by will guardians of his infant children under 12 Car. II. c. 24.

By various statutes passed from time to time relating to friendly societies, industrial and provident societies, savings banks, trade unions, &c., infants have been empowered, upon attaining sixteen years of age, to make nominations in the nature of testamentary dispositions of their shares and interests in such societies, &c., not exceeding 50*l*. See as to friendly societies, the Friendly Societies Act, 1875, s. 15, sub.-ss. (3) and (4); as to industrial and provident societies, the Industrial and Provident Societies Act, 1876, s. 11, sub.-ss. (5) and (6); as to trade unions, the Trade Union Act Amendment Act, 1876, s. 10; as to trustee

MARRIED WOMEN.

VIII. Provided also and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act (*m*). nor of a *feme covert*, except such as might have been previously made.

savings banks, the Trustee Savings Banks Act, 1863, ss. 41 and 42, and 50 & 51 Vict. c. 40, s. 3; as to Government Annuities, the Government Annuities Act, 1882, s. 6, sub.-head (e).

The provisions of the above-mentioned Acts were amended and extended to sums not exceeding 100*l.* by the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47). By that Act, "savings bank" includes "post-office savings banks" as well as trustee savings banks.

So much, however, of the last-mentioned Act as related to industrial and provident societies has been superseded by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 25 and 26; and so much as related to friendly societies and other societies registered under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), by sects. 56 and 57 of that Act. As to the validity of a nomination paper, when the property disposed of exceeds 100*l.*, see *In b. Baxter*, '03, P. 12; 72 L. J. P. 2; 87 L. T. 748.

(*m*) The effect of this section was to leave the legal testamentary capacity of a married woman (who has attained the age of twenty-one years) exactly as it stood under the old law. Thus a married woman's devise of real estate before 1883, as before 1838, must have been made in the exercise of a power created for the purpose; and her capacity to bequeath personalty not settled to her separate use must have been derived from the licence and authority of her husband. The Wills Act gave her no new power (Sugd. R. P. Stat. 331), but this section (sect. 8) does not operate to exclude the wills of married women, made in exercise of a testamentary power of appointment, from the operation of sect. 24, as to a will speaking as if executed immediately before the testator's death, or of sect. 27, as to a general gift operating as an execution of a power. Therefore a will made by a married woman, in the exercise of a testamentary power, may have an effect, by virtue of sects. 24 and 27, greater than it would have had before the statute, *Thomas* v. *Jones*, 1 D. J. & S. 63; 32 L. J. Ch. 139; 7 L. T. 610. A will made by a married woman who survived her husband, not re-executed during widowhood, had no greater effect than it would have had if she had died before her husband, and did not pass property acquired after his death, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345; 32 L. T. 410. Compare the note to sects. 24, 27. Testamentary capacity of married woman.

By the Married Women's Property Act, 1882, c. 75, a married woman 45 & 46 Vict. c. 75.

EXECUTION OF WILLS.

Will to be in writing, and signed or acknowledged in the presence of two witnesses at one time, who attest.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing (*n*) and executed in

---

is capable of disposing by will of any real or personal property, being her separate estate, in the same manner as if she were a *feme sole* (sect. 1); every woman who marries after the commencement of the Act, 1st January, 1883, is entitled to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property belonging to her at the time of her marriage, or acquired by or devolving upon her after marriage (sect. 2); and every woman married before the commencement of the Act is entitled to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act (sect. 5). The effect of sect. 5 of this Act is that if a married woman, married before 1883, acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property before the commencement of the Act, such property does not, upon falling into possession since the Act came into operation, become her separate property, *Reid* v. *Reid*, 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100.

Under the Married Women's Property Act, 1882, the law as laid down in *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345; 32 L. T. 410, applied to wills made by married women disposing of property which was their separate property under the Act. It was decided in *In re Price*, *Stafford* v. *Stafford*, 28 Ch. D. 709; 54 L. J. Ch. 509; 52 L. T. 430, that sect. 1, sub-sect. (1), of the Married Women's Property Act gave a married woman power to dispose by will only of property of which she was seised or possessed while she was under coverture, and that consequently, notwithstanding sect. 24 of the Wills Act, her will made during coverture was not, unless it was re-executed after she became discovert, effectual to dispose of property which she acquired after the coverture had come to an end.

But by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3., it is enacted that "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband." It has not been yet decided whether this enactment applies to wills executed by married women before the passing of the Act (5th Dec., 1893).

Will—upon what substance and

(*n*) A will may be written upon any substance, and with any material; but it is advisable that it should be written on vellum, parchment, or paper (Shep. Touch. 54); and to prevent any doubt or question as to the

§ 9.

authenticity of the document, the writing should throughout be by the same hand and in ink of one colour, *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57; *Birch* v. *Birch*, 1 Rob. 675; and see *In b. Bacon*, 3 No. Cas. 645. how to be written.

Formerly pencil writings, as distinguished from writings in ink, were held to be deliberative; Deane, Wills, 73. But under this statute a will may be written and signed in pencil; Sugd. R. P. Stat. 351, 352; *Gregory* v. *Queen's Proctor*, 4 No. Cas. 623; *Kell* v. *Charmer*, 28 Be. 195. In *Bateman* v. *Pennington*, 3 Moo. P. C. 227; 50 R. R. 37, Lord Brougham said, "All the cases show that the signing in pencil affords a *primâ facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." In that case the testator had filled up the date of his will, and also signed it, in pencil, the body of the will being in ink; his signature was preceded by the words, "In case of accidents I sign this my will;" the testator died suddenly, and probate was allowed of the will so executed. As to pencil alterations in a will which was confirmed by a codicil, see *In b. Hall*, L. R. 2 P. & D. 256; 40 L. J. P. 37; 25 L. T. 384. Will may be written in pencil.

A will the body of which is printed from type, or partly written and partly printed, is valid (see 2 Rob. 115, n.). In *In b. Adams*, L. R. 2 P. & D. 367; 41 L. J. P. 31; 26 L. T. 526, the blanks in a printed form were filled up partly in ink, and partly in pencil, some portion of the writing in ink extending over that in pencil, and some words of the latter having been rubbed out and obliterated; the words in pencil were held to be deliberative only, and were excluded from probate. Printed will good.

A will may be written or printed in any language, and either in words at length or contracted, or in figures, so that the testator's wishes are clear and unambiguous (Deane, Wills, 73); or in numbers and letters explained by a key, *East* v. *Twyford*, 4 H. L. C. 517; 94 R. R. 222. Thus, in *Kell* v. *Charmer*, 23 Be. 195, a testator bequeathed to his son William the sum of i. x. x., and to his son Robert the sum of o. x. x. The testator had carried on the business of a jeweller, and, in the course of his business, had used certain private marks to denote prices or sums of money, and according to such system the letters i. x. x. and o. x. x. represented the sums of 100*l.* and 200*l.* Extrinsic evidence being admitted to prove the above facts, effect was given to the will accordingly. In words or cypher.

If a will be in a foreign language, resort must be had to the foreign law or language for the purpose of deciding on the meaning of the particular words used in the will; but having so ascertained the meaning of the terms, the law of the testator's domicile governs the construction of the instrument so far as concerns personal estate, see *Martin* v. *Lee*, 14 Moo. P. C. 142, explained in *McGibbon* v. *Abbott*, 10 App. Cas. 653; 54 L. J. P. C. 39; 54 L. T. 138; also *In re Cliff's Trusts*, '92, 2 Ch. 229; 61 L. J. Ch. 397; 66 L. T. 483. See the note on Domicile, in the Appendix. In the case of a testator dying domiciled abroad, where the original will has been proved in the Court of the Foreign language.

§ 9.

domicile, an office or properly authenticated copy of it is received in place of the original for the purpose of being admitted to probate here, see Tristram & Coote's Probate Practice, 14th ed., pp. 50, 54.

Form unimportant.

An instrument, whatever may be its form, from which the intention of the maker can be gathered, that it is to affect the destination of his property after his death, will, if properly attested, be held to be testamentary; for example, an order upon testator's bankers, attested by two witnesses, *Jones* v. *Nicolay*, 2 Rob. 293; *In b. Marsden*, 1 Sw. & Tr. 542; 2 L. T. 87; a duly attested witness in the form of a deed, *In b. Montgomery*, 5 No. Cas. 99; *Doe* v. *Cross*, 8 Q. B. 714; 15 L. J. Q. B. 217; *In b. Morgan*, L. R. 1 P. & D. 214; 35 L. J. P. 98; 14 L. T. 894; *In b. Slinn*, 15 P. D. 156; 59 L. J. P. 82; 63 L. T. 229; or a letter, *In b. Maudy*, 2 Sw. & Tr. 119; 30 L. J. P. 85; 3 L. T. 380. And the testator's intention that such an instrument should operate as a will may be proved by parol evidence, *Jones* v. *Nicolay*, *ubi sup.*; *In b. Marsden*, *ubi sup.*; *In b. Webb*, 3 Sw. & Tr. 482; 33 L. J. P. 182; 11 L. T. 277; *In b. English*, 3 Sw. & Tr. 586; 34 L. J. P. 5; 11 L. T. 612; *Cock* v. *Cooke*, L. R. 1 P. & D. 241; 36 L. J. P. 5; 15 L. T. 296; *Robertson* v. *Smith*, L. R. 2 P. & D. 43; 39 L. J. P. 41; 22 L. T. 417; *In b. Coles*, L. R. 2 P. & D. 362; 41 L. J. P. 21; 25 L. T. 852; *In b. Slinn*, 15 P. D. 156; 59 L. J. P. 82; 63 L. T. 229. But where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed *animo testandi*; *Thorncroft* v. *Lashmar*, 2 Sw. & Tr. 479; 31 L. J. P. 150; 6 L. T. 476; *In b. Slinn*, *ubi sup.*; and see *Patch* v. *Shore*, 2 Dr. & S. 589; 32 L. J. Ch. 185; 7 L. T. 554. See also 1 Jarm. Wills, Ch. 2.

Draft upon a banker.

Deed.

Letter.

Document not executed *animo testandi*.

An excellent illustration of a document not executed *animo testandi*, and therefore not admissible to probate as testamentary, is afforded by the case of *Coventry* v. *Williams*, 2 Cur. 787. In that case testator executed under his hand and seal a document attested by two witnesses which, so far as material, was in the terms following: "I have determined to offer to Mrs. C. . . . the following small pittance, that poverty may never overtake her. I shall immediately order Mr. M., who has made my will, to make the following codicil to it. That . . . she shall enjoy from me the . . . allowance of £50 per annum to be paid by Messrs. Coutts & Co., Bankers, Strand, half-yearly, quarterly, or annually, as she shall will it, and after her death to her son. Given under my hand and seal, &c." There was no extrinsic evidence in this case that the document was intended by the testator to be testamentary. It will be noted that the allowance was to be paid by the testator's bankers, and not by his executors, and that it was not in terms testamentary.

Where the intention to execute the identical testamentary document propounded was completely absent, the wrong paper having been executed by mistake, probate was refused of the whole document,

§ 9.

although it contained certain dispositions in fact intended by the testatrix, *In b. Meyer*, '08, P. 353; 77 L. J. P. 150; 99 L. T. 881.

Not revocable.

It is of the essence of a testamentary paper that it should be revocable. A document which is not revocable, but comes into operation in the testator's lifetime, cannot be admitted to probate, *In b. Robinson*, L. R. 1 P. & D. 384; 36 L. J. P. 93; 17 L. T. 19.

As to whether probate can be granted of an instrument of which a part only is testamentary, see *In b. Robinson, ubi sup.*

Clause introduced by fraud, or *per incuriam*.

Where a clause is introduced into a will by fraud, *Allen* v. *M'Pherson*, 1 H. L. C. 191; 73 R. R. 30, or *per incuriam*, the testator not having given instructions for and being ignorant of the existence of such clause, *In b. Duane*, 2 Sw. & Tr. 590; 31 L. J. P. 173; 6 L. T. 788; *In b. Oswald*, L. R. 3 P. & D. 162; 43 L. J. P. 24; 30 L. T. 344, it forms no part of the will of the testator, and probate will be granted of the remainder, if the two are separable; but where the rejection of part alters the sense of the remainder, *qu.* whether there is a will; *Rhodes* v. *Rhodes*, 7 App. Cas. 192; 51 L. J. P. C. 53; 46 L. T. 463. In *In b. Boehm*, '91, P. 247; 60 L. J. P. 80; 64 L. T. 806, the will contained two similar clauses, by each of which the testator had, according to the instructions for the will, intended benefiting one of his daughters, Georgiana and Florence, but by mistake the name of Georgiana had been inserted in the will in both the clauses, thus leaving Florence unprovided for. The will had not been read over to the testator at any time. Probate was granted, omitting the name of Georgiana in the second clause of gift, although the will with the blank space where Florence's name was intended to be would not be left as the testator had intended it should be. Where a duly executed and attested codicil had been read over to a capable testatrix, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although the solicitor who prepared the codicil swore that they had been inserted without instructions from her, and by his inadvertence, *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109; 35 L. J. P. 116; 14 L. T. 69; and in *Harter* v. *Harter*, L. R. 3 P. & D. 11; 42 L. J. P. 1; 27 L. T. 858, it was held that, however clearly an error is proved, unless words have been inserted by fraud, or by mistake without the knowledge of the testator, the Court of Probate cannot correct it, either by the omission of words or the insertion of other words, inasmuch as to do so would be to make a new will for the testator. In *In b. Bushell*, 13 P. D. 7; 57 L. J. P. 16; 58 L. T. 58, and in *In b. Huddlestone*, 63 L. T. 255, the Court allowed certain words to be struck out and others to be inserted, but this practice was clearly wrong and will not be followed: *In b. Schott*, '01, P. 190; 70 L. J. P. 46; 84 L. T. 571. In *Morrell* v. *Morrell*, 7 P. D. 68; 51 L. J. P. 49; 46 L. T. 485, the word "forty" occurring in four places in a will was struck out

§ 9.

on proof being given that it had been inserted by inadvertence, but no other word was substituted for it. In both the cases of *Bushell* and *Morrell* the clauses had not been read over to the testator, but it was laid down by the House of Lords in *Fulton* v. *Andrew*, L. R. 7 H. L. 448; 44 L. J. P. 17; 32 L. T. 209, that there is no unyielding rule of law that all further inquiry is shut out by proof that a testator competent in mind has had the will read over to him, and has thereupon executed it. See also *Garnett Botfield* v. *Garnett Botfield*, '01, P. 335; 71 L. J. P. 1; 85 L. T. 641; *Vaughan* v. *Clerk*, 87 L. T. 144; and *Briscoe* v. *Baillie Hamilton*, '02, P. 234; 71 L. J. P. 121; 87 L. T. 746.

In *Collins* v. *Elstone*, '93, P. 1; 62 L. J. P. 26; 67 L. T. 624, a testatrix left two wills, and a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that, as it only related to the insurance policy, the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance, the testatrix executed the will. *Held*, that the testatrix must be taken to have known and approved of those words of revocation, and that they must be included in the probate of the last will.

It may be usefully noted here that any attack upon a will or codicil or any clause thereof upon the ground of fraud or undue influence must be made in the Probate Division: after probate the Chancery Division has no jurisdiction to entertain any such case, *Meluish* v. *Milton*, 3 Ch. D. 27; 45 L. J. Ch. 836; 35 L. T. 82.

A testamentary paper duly executed is entitled to probate, although not intended to operate, and not becoming operative, until some time after the testator's death, *In b. Newns*, 7 Jur., N. S. 688.

A duly executed paper, testamentary on the face of it, may be excluded from probate by parol evidence clearly proving that it was not intended by the deceased to affect the disposition of his property after his death, *Lister* v. *Smith*, 3 Sw. & Tr. 282; 33 L. J. P. 29; 9 L. T. 578.

Contingent will.

A will may be made to take effect on a contingency; if the contingency does not happen, the will ought not to be admitted to probate (1 Jarm. Wills, 25), and is inoperative to revoke a prior will, *In b. Hugo*, 2 P. D. 73; 46 L. J. P. 21; 36 L. T. 518. A testator wrote a codicil concluding thus, "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary;" the wife elected not to avail herself of the codicil, and it was not admitted to probate, *In b. Smith*, L. R. 1 P & D. 717; 38 L. J. P. 85; 21 L. T. 340. See also *In b. Porter*, L. R. 2 P. & D. 22; 39 L. J. P. 12; 21 L. T.

§ 9.

680; *In b. Robinson*, L. R. 2 P. & D. 171; 40 L. J. P. 16; 23 L. T. 397; and *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; 42 L. J. P. 32; 27 L. T. 322. But the Court is unwilling to refuse probate unless it is clear that the testator intended the will to be operative only in a certain event or during a certain period, *In b. Dobson*, L. R. 1 P. & D. 88; 35 L. J. P. 54; 13 L. T. 758. See the considered judgment of Sir F. Jeune, in *In b. Spratt*, '97, P. 28; 66 L. J. P. 25; 75 L. T. 518, in which the previous cases are reviewed. See also *Halford* v. *Halford*, '97, P. 36; 66 L. J. P. 29; 75 L. T. 520. Merely equivocal words will not suffice, *In b. Mayd*, 6 P. D. 17; 50 L. J. P. 7: and a will, contingent in terms, but executed after the event, is thereby rendered absolute, *In b. Cawthron*, 3 Sw. & Tr. 417; 33 L. J. P. 23. Unattested memoranda, written subsequently to the execution of the will, will not be admitted as evidence of the contingent nature of the will, *Stockwell* v. *Ritherdon*, 1 Rob. 661. A will expressed to take effect only upon an event which does not happen cannot be established by evidence of the testator's intention to adhere thereto, *In b. Winn*, 2 Sw. & Tr. 147; 4 L. T. 655; *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; 31 L. J. P. 46; 5 L. T. 689; but a codicil expressed to take effect only upon an event which does not happen may operate as a re-execution of a will therein referred to, and on that account may be entitled to probate, *In b. Da Silva*, 2 Sw. & Tr. 315; 30 L. J. P. 171; 5 L. T. 140. In the case of *Doe* v. *Haslewood*, 10 C. B. 544; 84 R. R. 688, the testator made his will in favour of a nephew, but with a proviso in favour of the child with which his wife was then pregnant, if such child should be born after the testator's death; the child was, in fact, born in the testator's lifetime, and the Court held that, in such a case, the testator did not contemplate the birth of a child in his lifetime, and did not intend to provide by his will for a child so born; the proviso in the will was made in contemplation of a particular combination of circumstances, which not having happened, the proviso failed. See, however, 1 Jarm. Wills, 507.

Blanks.

Wills of more than one sheet are usually written on one side only of brief paper, the sheets being fastened together (though this fastening is not absolutely necessary, *Gregory* v. *Queen's Proctor*, 4 No. Cas. 620) at one of the corners, the back of each sheet being left blank. To this plan there is no objection, as the Act does not require a will to be written continuously, *In b. Corder*, 1 Rob. 669. And even if there is a blank in the body of the writing as in *Corneby* v. *Gibbons*, 1 Rob. 705, where the blank left was half a page, the will is valid; see also *Kirby's Case*, 6 No. Cas. 693. This shows the weakness of the objection which, before the passing of 15 & 16 Vict. c. 24 (*post*), was raised to a space being left between the conclusion of the will and the signature (Sugd. R. P. Stat. 335). And if a will is prepared with blanks, and those blanks are filled up in the handwriting of the testator, the presumption of law is that they were supplied before the execution of the will, *Birch* v. *Birch*, 1 Rob. 675.

Blanks filled up in testator's handwriting.

§ 9.

As already stated, a complete blank in a will cannot be filled up, but parol evidence may be resorted to in order to explain, with reference to a partial blank, words which of themselves have a reasonable meaning, *In b. Hubbuck*, '05, P. 129; 74 L. J. P. 58; 92 L. T. 665.

Construction where probate has been granted in blank.

When probate has been granted of a will containing blank spaces, the court of construction has no power to fill up the blank spaces, so as to make sense of that which, without such alteration, is nonsense, unless from some other portions of the will, or upon the construction of the will as a whole, the Court can see in what manner the testator intended to fill up the blanks. A court of construction, for this purpose, will look at the original will, and not merely at the probate, *Re Harrison*, 30 Ch. D. 390; 55 L. J. Ch. 799; 53 L. T. 799; *Taylor* v. *Richardson*, 2 Drew. 16; 23 L. J. Ch. 9; 100 R. R. 6. See also *Mason* v. *Bateson*, 26 Be. 404; 28 L. J. Ch. 391; *Edmunds* v. *Waugh*, 4 Drew. 275; *Greig* v. *Martin*, 7 W. R. 315.

Where a will contained the words, "I appoint R. H. B. and J. E. W.," it was held that the rest of the will showed that the testator must have intended to appoint them executors, and probate was granted to them, *In b. Bradley*, 8 P. D. 215; 52 L. J. P. 101.

Incorporation of documents, in existence, and clearly identified.

Any written document in existence at the execution of a will, *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; 31 L. J. P. 49; 5 L. T. 719; *In b. M'Cabe*, 2 Sw. & Tr. 474; 31 L. J. P. 190; 6 L. T. 474; *Van Straubenzee* v. *Monck*, 3 Sw. & Tr. 6; 32 L. J. P. 21; 7 L. T. 723; may be incorporated with, and made part of, the will, *Allen* v. *Maddock*, 11 Moo. P. C. 427; *Ferraris* v. *Marquis of Hertford*, 3 Cur. 468; *In b. Daniell*, 8 P. D. 14; 52 L. J. P. 23; 48 L. T. 124. But the incorporated instrument must be clearly identified, *Allen* v. *Maddock*, *supra*; *In b. Drummond*, 2 Sw. & Tr. 8; 2 L. T. 391; *In b. Brewis*, 3 Sw. & Tr. 473; 33 L. J. P. 124; *In b. Tovey*, 47 L. J. P. 63; 39 L. T. 235; *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653. For the purpose of such identification parol evidence was before 1838, and is now, admissible, *Allen* v. *Maddock*, *supra*; and if, in the existing circumstances, the identity is proved, it is no objection that, by possibility, circumstances might have existed in which the instrument could not have been identified, *ib.* But the principle of *Allen* v. *Maddock* will not be extended, *In b. Greves*, 1 Sw. & Tr. 250; 28 L. J. P. 18. See also *University College of North Wales* v. *Taylor*, '08, P. 140; 77 L. J. P. 20; 98 L. T. 472. If the will does not describe the document as then existing parol evidence will not be admitted to prove its existence, *In b. Sunderland*, L. R. 1 P. & D. 198; 35 L. J. P. 82; 14 L. T. 741; *In b. Dallow*, L. R. 1 P. & D. 189; 35 L. J. P. 81; 14 L. T. 573. But where a will, if read as speaking at the date of a codicil, contains language which would operate as an incorporation, the document, though not in existence until after the execution of the will, is entitled to probate by force of the codicil, *In b. Lady Truro*, L. R. 1 P. & D. 201; 35 L. J. P. 89; 14 L. T. 893; *In b. Hunt*, 2 Rob. 622; *In b. Stewart*, 4 Sw. & Tr. 211; *In b. Rendle*,

Parol evidence admissible.

§ 9.

68 L. J. P. 125; *In b. Green*, 79 L. T. 738. But see *In b. Warner*, 10 W. R. 566; *In b. Reade*, '02, P. 65; 71 L. J. P. 45; 86 L. T. 258; *In b. Smart*, '02, P. 238; 71 L. J. P. 123; 87 L. T. 142.

In *In b. Marchant*, '93, P. 254; 62 L. J. P. 114, a testatrix left two testamentary documents of which only one was duly executed. The first or unexecuted document made various specific bequests, and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew "for the purposes I require him to do absolutely." *Held*, that the two documents could not be admitted to probate as together constituting the will of the deceased, but probate was granted of the second document with directions to the executor to administer the estate in conformity with the trusts of the first document.

Incorporation by the words "ratify and confirm."

The words "ratify and confirm" used by a testator in his will are sufficient to render a deed of settlement to which they are applied entitled to probate as part of the will, *Sheldon* v. *Sheldon*, 1 Rob. at p. 89; see also *Stump* v. *Gaby*, 2 D. M. & G. 623; 22 L. J. Ch. 352; 95 R. R. 257; and *In b. Harris*, L. R. 2 P. & D. 83; 39 L. J. P. 48; 22 L. T. 630, where a will disposing only of property in Tasmania and appointing executors in Tasmania was ratified and confirmed by a subsequent will disposing of property in England and appointing different executors in England, and the Court ordered probate to issue of both, as together constituting the will of the deceased. And see *In b. Howden*, 43 L. J. P. 26; 30 L. T. 768; *In b. Lockhart*, 69 L. T. 21.

Incorporated instruments may be invalid of themselves.

It is unimportant that the incorporated document is voidable or invalid. See cases already referred to, and *Stump* v. *Gaby*, *supra*; *In b. Smartt*, 4 No. Cas. 38; *Swete* v. *Pidsley*, 6 No. Cas. 189; *In b. Willesford*, 3 Cur. 77. Indeed, it is the invalidity of the document standing alone which generally necessitates its incorporation in the probate. In *In b. Bosanquet*, 14 Jur. 964, an unattested document, purporting to exercise a power of appointment, was held to be incorporated with a will; *In b. Mercer*, L. R. 2 P. & D. 91; 39 L. J. P. 43; 23 L. T. 195, an unattested copy of a will made in India, and *In b. Heathcote*, 6 P. D. 30; 50 L. J. P. 42; 44 L. T. 280, the invalid will of a married woman, was held to be incorporated with a codicil; in *In b. Countess of Durham*, 3 Cur. 57, the revoked will of another person, and in *In b. Hally*, 5 No. Cas. 510, a letter was held to be incorporated with the will in which it was referred to; and for an instance of a revoked will being conditionally revived by incorporation, see *In b. Bangham*, 1 P. D. 429; 45 L. J. P. 80. But a deed referred to as "made" by the testator, but in fact not executed by him, was held not to be incorporated with his will, not being considered to be sufficiently identified, *In b. Edwards*, 6 No. Cas. 306; and alterations unaccounted for in a duly identified and incorporated document were excluded from probate, *Swete* v. *Pidsley*, *ib.* 189. See also *Eyre* v. *Eyre*, '03, P. 131; 72 L. J. P. 45; 88 L. T. 567.

Unidentified alterations.

In *In b. Bacon*, 3 No. Cas. 645, a schedule of books, and in *In b. Ash*,

§ 9.

D. & Sw. 181, a list of plate, written on the same sheet as the will, and in *In b. Hunt*, 2 Rob. 622, and in *In b. Stewart*, 4 Sw. & Tr. 211, lists of articles on separate papers, were held to be incorporated.

Insufficient identity.

In the following cases the identity was held to be insufficiently shown, and the instruments intended to be referred to were not made parts of the respective wills, *Collier* v. *Langebeare*, 1 No. Cas. 369; *In b. Astell*, 5 No. Cas. 489, n.; *In b. Baldwin*, *ib.* 293; *In b. Skair*, *ib.* 57; *In b. Hakewell*, D. & Sw. 14; *In b. Sotheron*, 2 Cur. 831; *In b. Countess of Pembroke*, D. & Sw. 182. In several cases the document intended to be incorporated was actually written upon the back of the same piece of paper as the will itself. See *In b. Drummond*, 2 Sw. & Tr. 8; 2 L. T. 391; *In b. Brewis*, 3 Sw. & Tr. 473; 33 L. J. P. 124; *In b. Tovey*, 47 L. J. P. 63; 39 L. T. 235.

Incorporated documents, probate of.

Strictly, all papers entitled to probate ought to receive probate; but the Court exercises a discretion, *Quihampton* v. *Going*, 24 W. R. 917; and in the case of a will referring to and incorporating a deed in the possession of persons (trustees for example) who will not give up the deed, probate will be passed of the will alone, without a deposit of the original deed, *Sheldon* v. *Sheldon*, 1 Rob. 81; *In b. Battersbee*, 2 Rob. 439; *In b. Sibthorp*, L. R. 1 P. & D. 106; 35 L. J. P. 73; 13 L. T. 803; a notarial copy, if obtainable, will be deposited in the registry, and a similar copy will form part of the probate, *In b. Dickins*, 3 Cur. 60; but see *In b. Dundas*, 1 N. R. 569; *In b. Marquis of Lansdowne*, 3 Sw. & Tr. 194; 32 L. J. P. 121; 9 L. T. 22. In *In b. Balme*, '97, P. 261; 66 L. J. P. 161; 77 L. T. 219, a testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would have entailed considerable expense. Probate was granted without requiring the catalogue to be brought into the registry, the college undertaking to hold the catalogue for the registry, and a note to that effect being made upon the probate. In *In b. Countess of Limerick*, 2 Rob. 313, probate was granted of a will with extracts from a document referred to, but not recited, in the will. Where a second will, appointing separate executors and disposing only of British funds, contained a direction that it should take effect as a separate instrument independent of an American will, it was held unnecessary to incorporate the American will, but an authenticated copy thereof was filed, and a note to that effect was added to the English probate, *In b. Astor*, 1 P. D. 150; 45 L. J. P. 78; 34 L. T. 856. And where there are two wills, one dealing with property in England, and the other dealing exclusively with property situate abroad, the Court will decree probate of the English will only, *In b. Tamplin*, '94, P. 39; 63 L. J. P. 75; *In b. Murray*, '96, P. 65; 65 L. J. P. 59. See also *In b. Calloway*, 15 P. D. 147; 59 L. J. P. 73.

In *Quihampton* v. *Going*, *ubi sub.*, entries in the testator's ledger, referred to by the will, were treated by a court of construction as a part of the will, although they were not included in the probate.

manner hereinafter mentioned (*o*); that is to say, it shall be signed at the foot or end thereof (*p*) by the testator (*q*) or by

§ 9.

(*o*) The provisions of the Act as to the execution of a will cannot be evaded by means of a power created for the purpose, *Johnson* v. *Ball*, 5 De G. & S. 85; 21 L. J. Ch. 210; 90 R. R. 19.

(*p*) The will shall be signed "*at the foot or end thereof.*" The litigation on this branch of the 9th section has, since the passing of the Act 15 & 16 Vict. c. 24 (*post*), almost ceased. The last-mentioned Act being retrospective (except under the circumstances referred to in the 2nd section) as well as prospective, the cases decided between the 1st January, 1838, and the 17th June, 1852 (when the amending Act came into operation), on the position of the testator's signature, have not now much practical value, except that as to all wills which the Court had pronounced to be defectively executed the parties interested are, by sect. 2, shut out from the benefits of the amending Act (16 Jur. 602, n.). The cases will be found collected in Sugd. R. P. Stat. c. 7, s. 1, 1st ed.; Deane, Wills, 71. Signature at the foot or end of the will.

(*q*) The will shall be signed "*by the testator.*" It is essential to the validity of a will that, at the time of signing, the testator should know and approve of its contents, *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64; 35 L. J. P. 18; 13 L. T. 473; *Cleare* v. *Cleare*, L. R. 1 P. & D. 655; 38 L. J. P. 81; 20 L. T. 497; but proof of the actual reading over of the document to him is not necessary, *Mitchell* v. *Thomas*, 6 Moo. P. C. 137. The onus of proof of the genuineness and authenticity of a will lies on the party propounding it, and if the conscience of the judge is not satisfied on these points he is bound to refuse probate, *Baker* v. *Batt*, 2 Moo. P. C. 317; 46 R. R. 52; and this burthen is in general discharged by proof of capacity and the fact of execution of the will, from which knowledge and approval of its contents by the testator will be presumed, *Barry* v. *Butlin*, 2 Moo. P. C. 480; 46 R. R. 123; *Browning* v. *Budd*, 6 Moo. P. C. 430; but that presumption may be rebutted by circumstances (*ib.*). For the rule as to *onus* of proof upon a person propounding a will executed under suspicious circumstances, see *Tyrrell* v. *Painton*, '94, P. 151; 70 L. T. 453. Testator, signature of. His knowledge of the contents of the will.

In the case of a blind testator it is highly desirable, though not absolutely necessary, that the will should be read over to him, *Longchamp* v. *Fish*, 2 B. & P., N. R. 415; 9 R. R. 670; *Edwards* v. *Fincham*, 4 Moo. P. C. 198. The Ecclesiastical Courts were more strict on this head than the Courts of Law, and required that the will of a blind testator should be read over to him in the presence of a witness, although not necessarily in the presence of a subscribing witness, Sugd. R. P. Stat. 335; and by the 71st rule of 1862, the registrars of the Probate Court are forbidden to grant probate of the will of a blind or illiterate person unless satisfied that it was read over to him before execution, or that he then had knowledge of its contents. See also Blind testator.

§ 9.

*In b. Axford*, 1 Sw. & Tr. 540. As to the will of an aged testator, see *Goose* v. *Brown*, 1 Cur. 707; and as to a deaf and dumb testator, see *In b. Owston*, 2 Sw. & Tr. 461; 31 L. J. P. 177; 6 L. T. 368; *In b. Geale*, 3 Sw. & Tr. 431; 33 L. J. P. 125.

Aged or deaf and dumb testator.

Time of signing by testator.

The signature of the testator must precede that of both the witnesses in point of time; if the testator signs after the witnesses, or either of them, the execution is invalid, *In b. Olding*, 2 Cur. 865; *In b. Byrd*, 3 Cur. 117; *In b. Hoskins*, 1 N. R. 569; see also *Cooper* v. *Bockett*, 4 Moo. P. C. 419; 59 R. R. 371. The testator's signature upon the will must be seen by the witnesses, *Hudson* v. *Parker*, 1 Rob. 25; *Shaw* v. *Neville*, 1 Jur., N. S. 408; or at all events they should see the testator in the act of writing that which the Court presumes to be his signature, *Smith* v. *Smith*, L. R. 1 P. & D. 143; 35 L. J. P. 65; 14 L. T. 417; but the witnesses need not know that the document is of a testamentary character, *Gaze* v. *Gaze*, 3 Cur. 451; *Keigwin* v. *Keigwin*, *ib.* 607; Sugd. R. P. Stat. 339, 340. The witnesses, however, ought to see that there is writing on the paper before the testator's signature is affixed or acknowledged, or other evidence must be produced to show that the paper was not a blank, *In b. Hammond*, 3 Sw. & Tr. 90; 32 L. J. P. 200; 8 L. T. 516.

Witnesses must see the signature of testator.

Testator's signature.

By making his mark.

The mark of the testator (whether he can or cannot write) is a sufficient signature, *In b. Field*, 3 Cur. 752; *Baker* v. *Dening*, 8 A. & E. 94; 47 R. R. 502; even though his name is not affixed to the mark, *In b. Bryce*, 2 Cur. 325; a facsimile of testator's signature impressed on the will by means of an engraved stamp is sufficient, *Jenkins* v. *Gaisford*, 3 Sw. & Tr. 93; 32 L. J. P. 122; 8 L. T. 517; and where a wrong name is added by one of the witnesses to the testator's mark, the execution, if there is no doubt as to the identity, is good, *In b. Clarke*, 1 Sw. & Tr. 22; 27 L. J. P. 18; *In b. Powell*, 6 No. Cas. 557. See also *In b. Douce*, 2 Sw. & Tr. 593; 31 L. J. P. 172; 6 L. T. 789, where the person who wrote a will for a marksman, misnamed him in the body of the will, and also wrote a wrong name opposite to the testator's mark. The will was admitted to probate.

Wrong name.

The signature to her will by a married woman in the name of her deceased first husband is good, *In b. Glover*, 5 No. Cas. 553; and the signature in an assumed name is good, *In b. Redding, otherwise Higgins*, 2 Rob. 339; and where the testatrix, after signing in an assumed name, erased that name, and inserted her real name without any formal re-execution of her will, the original execution was held good (*ib.*). The signature of a testator by writing his initials is good, *In b. Wingrove*, 15 Jur. 91; *In b. Savory*, *ib.* 1042; *In b. Hinds*, 16 Jur. 1161. The hand of the testator, if he is unable from illness to sign, may be guided, *Wilson* v. *Beddard*, 12 Sim. 28. But the ceremony of execution must be complete whilst the testator is living; for where an intended testator tries to sign his will, but fails from weakness, the Court has no power to decree probate, *In b. Wilson*, 2 Cur. 854.

By initials.

some other person in his presence and by his direction (*r*); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*s*); and such witnesses shall

§ 9.

---

The sealing (without signing) of a will by the testator is not a due execution, *In b. Summers*, 7 No. Cas. 562; *Smith* v. *Evans*, 1 Wils. 313; *Wright* v. *Wakeford*, 17 Ves. 459; 2 Hayes, Conv. 642. Sealing.

The declaration by a testator (an Indian officer), in a letter to his brother in England, that he had executed a will of which he inclosed a copy in the letter, was held inadmissible, and probate of the copy was not granted, *In b. Ripley*, 1 Sw. and Tr. 68. See also the note to sect. 21. *Ex post facto* declarations of testator inadmissible.

(*r*) The will shall be signed "*by the testator or by some other person in his presence and by his direction.*" The "other person" here referred to may be one of the witnesses, *In b. Bailey*, 1 Cur. 914; *Smith* v. *Harris*, 1 Rob. 262; and where a witness, *In b. Ullersperger*, 6 Jur. 156, or the other person above referred to, *In b. Clark*, 2 Cur. 329; *In b. Blair*, 6 No. Cas. 528, signed his own name instead of that of the testator, the signature was held good. Testator, signature of, by an amanuensis.

(*s*) The signature shall be made or acknowledged "*in the presence of two or more witnesses present at the same time.*" Both the witnesses must be present together when the will is signed by or by the direction of the testator, or when the signature is acknowledged by him, *In b. Mansfield*, 1 No. Cas. 362; and see *In b. Ayling*, 1 Cur. 913. And the two witnesses must both sign in the presence of the testator, but it is not necessary that the witnesses should sign in the presence of each other, *Faulds* v. *Jackson*, 6 No. Cas. Supp. 1; *Chodwick* v. *Palmer*, cited D. and Sw. 2; *In b. Webb*, D. & Sw. 1; but it is necessary that both witnesses should be jointly present at the same act of the testator. Therefore, if the order of events is as follows—viz., (1) testator signs will in presence of first witness, (2) first witness attests signature, (3) second witness arrives, and testator in presence of both witnesses acknowledges his signature, (4) second witness attests—the execution will be insufficient because the signature was attested by the first witness only, and the acknowledgment by the second witness only. The second witness was not a witness to the signature, and the first witness was not a witness to the acknowledgment, *Wyatt* v. *Berry*, '93, P. 5; 62 L. J. P. 28; 68 L. T. 416; *Brown* v. *Skirrow*, '02, P. 3; 71 L. J. P. 19; 85 L. T. 645; and see *In b. Allen*, 2 Cur. 331; *In b. Simmonds*, 3 Cur 79; *Casement* v. *Fulton*, 5 Moo. P. C. 130; 70 R. R. 19; Sugd. R. P. Stat. 342; *Moore* v. *King*, 3 Cur. 243. Witnesses, presence of, with respect to each other and the testator.

The testator must be in such a position that he might, if he had wished, have seen the witnesses as they subscribed, *Casson* v. *Dade*, 1 Br. C. 99. Therefore, during the ceremony of the execution and attestation Testator, presence of, with respect to the

§ 9.

witnesses on their signing.

of a will, the testator should not turn his back upon the witnesses, or be shut out from their view by a curtain, or a screen, or in any other mode, *Tribe* v. *Tribe*, 1 Rob. 775; see, however, Sugd. R. P. Stat. 343; and *Newton* v. *Clarke*, 2 Cur. 320, in which case, under circumstances similar to those in *Tribe* v. *Tribe*, the execution was supported. The witnesses should not go into an adjoining room for the greater convenience of affixing their signatures, *In b. Newman*, 1 Cur. 914; *In b. Ellis*, 2 Cur. 395; *In b. Colman*, 3 Cur. 118; *Norton* v. *Bazett*, D. & Sw. 259; *In b. Killick*, 3 Sw. & Tr. 578; 34 L. J. P. 2; *Jenner* v. *Finch*, 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; *Carter* v. *Seaton*, 85 L. T. 76.

Blind testator.

And in the case of a blind testator, the witnesses must, when they are in the act of signing their names, be in such a position that the testator, if he were not blind, could see them affixing their signatures, *In b. Piercy*, 1 Rob. 278.

Presumption in favour of due acknowledgment.

It will be seen that it is the testator's signature, not his will, that is required to be acknowledged. Where the will is perfect on the face of it, the presumption is in favour of a due acknowledgment—*omnia præsumuntur rite esse acta*, *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Wright* v. *Sanderson*, 9 P. Div. 149; 53 L. J. P. 49; 50 L. T. 769; *In b. Moore*, '01, P. 44; 70 L. J. P. 16; 84 L. T. 60.

Acknowledgment assumed from circumstances.

Acknowledgment by express words is not necessary. The acknowledgment by the testator that the document produced bears his signature, or a signature made by his direction, may be assumed from the attendant circumstances, *Gaze* v. *Gaze*, 3 Cur. 451; *Blake* v. *Knight*, *ib.* 547; *Keigwin* v. *Keigwin*, *ib.* 607; *In b. Ashmore*, *ib.* 756; *In b. Thomson*, 4 No. Cas. 643; *In b. Dinmore*, 2 Rob. 641; *Daintree* v. *Butcher*, 13 P. D. 102; 57 L. J. P. 76; 58 L. T. 661. Where a testatrix was extremely ill, her acknowledgment by gesture was held sufficient, *In b. Davies*, 2 Rob. 337; and an acknowledgment may be assumed from the acts of the testator at the time of attestation, *In b. Jenner*, 6 Jur. 564; *In b. Bosanquet*, 2 Rob. 577; *In b. Philpot*, 3 No. Cas. 2; *In b. Jones*, D. & Sw. 3; or from the attendant circumstances, though no act be done or word uttered by the testator, *Faulds* v. *Jackson*, 6 No. Cas. Supp. 1; *Inglesant* v. *Inglesant*, L. R. 3 P. & D. 172; 43 L. J. P. 43; 30 L. T. 909. A simple request by a testator that the witnesses would put their names underneath his own is sufficient, *Gaze* v. *Gaze*; *Keigwin* v. *Keigwin*, *ubi sup.* Where two witnesses, one of whom had the will in his hand, came into the testatrix's bed-room, and said, "We have come at your request to witness your will," and the testatrix said, "I am glad of it, thank God!" and the witnesses thereupon signed the will, which had been previously signed by the testatrix, this was held a sufficient acknowledgment, *In b. Warden*, 2 Cur. 334. And acknowledgment will be presumed from the attendant circumstances, whether the signature be made by the testator himself, or by some other person in his presence by his direction, *In b. Regan*, 1 Cur. 909. But acknowledgment will not be presumed from the testator's sealing and delivering the will as his act and deed, the

attest (*t*) and shall subscribe the will in the presence of § 9.

will having been signed by another person on behalf of the testator, *In b. Summers*, 7 No. Cas. 563. And in the cases where acknowledgment is presumed from attendant circumstances, it is necessary that the witnesses, before they sign, should actually see that the document bears the testator's signature, *Ilott* v. *Genge*, 4 Moo. P. C. 271; 59 R. R. 366; *Hudson* v. *Parker*, 1 Rob. 14; *Shaw* v. *Neville*, 1 Jur., N. S. 408; *Pearson* v. *Pearson*, L. R. 2 P. & D. 451; 40 L. J. P. 53; 24 L. T. 917; or, at all events, should have the opportunity of seeing the signature; if such be not the case, it is immaterial whether the signature be there at the time of attestation, or whether the testator say that the paper is his will, or that his signature is inside, *Blake* v. *Blake*, 7 P. D. 102; 51 L. J. P. 36; 46 L. T. 641; disapproving *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29 L. J. P. 31; and *Beckett* v. *Howe*, L. R., 2 P. & D. 1; 39 L. J. P. 1; 21 L. T. 400. Sealing an insufficient acknowledgment.

Positive affirmative evidence by the subscribing witnesses to the fact of the signing or acknowledgment of the will by the testator in their presence is not absolutely essential, and the Court may, in the absence of suspicious circumstances, presume a due execution, *Blake* v. *Knight*, 3 Cur. 547; *Hitch* v. *Wells*, 10 Be. 84; *In b. Huckvale*, L. R., 1 P & D. 375; 36 L. J. P. 84; 16 L. T. 434; and it is favourable to this presumption if the testator had experience in the execution of legal documents, *Plenty* v. *West*, 9 Jur. 458; *Lloyd* v. *Roberts*, 12 Moo. P. C. 158. But where there is no formal attestation clause, and no affirmative evidence that the testator's signature was on the paper when the witnesses signed, the mere production of it to witnesses with a request that they will sign it is insufficient to enable the Court to infer that it was already signed by the deceased, *Fischer* v. *Popham*, L. R., 3 P. & D. 246; 44 L. J. P. 47; 33 L. T. 231. As to acknowledgment by a marksman, see *Morritt* v. *Douglas*, L. R. 3 P. & D. 1; 42 L. J. P. 10; 27 L. T. 591. As to evidence of testator's signature. Marksman.

(*t*) The witnesses "*shall attest and subscribe the will.*" As to the meaning of "attest," see *Doe* v. *Burdett*, 10 C. & F. 340; *Warren* v. *Postlethwaite*, 2 Coll. 113; 70 R. R. 157; and of "subscribe," according to the Stat. of Frauds, *Roberts* v. *Phillips*, 4 E. & B. 450; 24 L. J. Q. B. 171; 99 R. R. 553; Sugd. Pow. 229, 240. Where the witnesses signed their names in the margin of the paper on which the will was, and opposite to certain alterations, but with the intention of attesting the testator's signature to the will, this was held to be a valid subscription, *In b. Streatley*, '91, P. 172; 60 L. J. P. 56. See also *Woodhouse* v. *Balfour*, 13 P. D. 2; 57 L. J. P. 22; 58 L. T. 59. "Attest" and "subscribe."

It has been contended that the "presence" of the witnesses required by this section is a presence simply and grossly corporeal (see H. Sugd. Wills, 37; Sugd. R. P. Stat. 340), so that a person of unsound mind might be a witness to a will. It seems, however, to be the better "Presence" of witness, what is.

§ 9.

opinion that not only a bodily but a mental presence is required, see 1 Hayes, Conv. 360, 363, 371; Taylor, Evidence, 757; *Hudson* v. *Parker*, 1 Rob. 24. Even if it be conceded that mental consciousness is not included in the idea of "presence," and that it is not necessary to enable the person duly to "subscribe," still the witness is required to do something more—he must "attest" the will; and this would seem to imply, not only general sanity and mental consciousness, but particular consciousness of and attention to the actual ceremonies of execution. In short, the witness must have the intention of attesting the testator's signature, *Griffiths* v. *Griffiths*, L. R. 2 P & D. 300; 41 L. J. P. 14; 25 L. T. 574.

Minor.

A minor may attest a will; unless incompetent from extreme youth to understand and testify (Ste. Evid. ch. 15).

Full attestation clause—and witnesses dead;

If the subscribing witnesses to a will, of which the attestation clause is in the proper form, are both dead, the law presumes the will to have been well executed; the presumption of law is in favour of the due execution of the will, if the witnesses, *Burgoyne* v. *Showler*, 1 Rob. 5, or either of them, *Blake* v. *Knight*, 3 Cur. 547; *Leech* v. *Bates*, 1 Bob. 714; *Shield* v. *Shield*, 4 No. Cas. 647, be living and entirely forgetful of all the facts, *Foot* v. *Stanton*, D. & Sw. 19; *In b. Holgate*, 1 Sw. & Tr. 261; 29 L. J. P. 161; *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29 L. J. P. 31; *In b. Colyer*, 14 P. D. 48; 60 L. T. 368; *Whiting* v. *Turner*, 89 L. T. 71.

or forgetful of the fact.

Imperfect attestation clause—and witnesses cannot be found;

Where a will has an imperfect attestation clause, and the witnesses cannot be found, *In b. Luffman*, 11 Jur. 211; *In b. Sir J. Dickson*, 6 No. Cas. 278; or the will contains no attestation clause, but only the signatures of the witnesses, and they are dead, *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156; 2 L. T. 519; *Harris* v. *Knight*, 15 P. D. 170; 62 L. T. 507; or the witnesses do not remember some of the facts, *In b. Leach*, 12 Jur. 381; see also *In b. Thomas*, 1 Sw. & Tr. 255; 28 L. J. P. 33, or differ in their evidence or their recollection fails, *Gregory* v. *Queen's Proctor*, 4 No. Cas. 620; *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580; 34 L. J. P. 18; the will, if all the attendant circumstances lead to the inference that the signatures of the witnesses are genuine, will be held to be duly executed. See *In b. Peverett*, '02, P. 205; 71 L. J. P. 114; 87 L. T. 143. Where two witnesses to a will executed abroad were out of the jurisdiction, and the third witness dead, the Court of Exchequer decided that proof of the handwriting of the testator and witnesses was sufficient proof of the attestation of the will, *Platel* v. *Stert*, 2 L. T. 210; and when the inaccuracy and imperfect recollection of the witnesses are established, the Court may, upon the circumstances of the case, presume the due execution, *Leech* v. *Bates*, 1 Rob. 715; *Wright* v. *Sanderson*, 9 P. D. 149; 53 L. J. P. 49; 50 L. T. 769. So where one witness deposed to the due execution of the will, and the other witness had no recollection of the facts, probate was allowed, *In b. Hare*, 3 Cur. 54. But if the subscribing witnesses negative the fact of compliance with

or forget the facts.

Witnesses out of the jurisdiction.

Evidence of witnesses inaccurate and imperfect.

§ 9.

the requisites of the 9th section, probate will be refused, *Beach* v. *Clarke*, 7 No. Cas. 120; *Croft* v. *Croft*, 4 Sw. & Tr. 10; 34 L. J. P. 44; 11 L. T. 781; unless the evidence of the witnesses be rebutted by showing either that they cannot be credited or that upon the statement of the facts their memories are defective, *Burgoyne* v. *Showler*, 1 Rob. 5; or that there are circumstances raising a presumption that the witnesses are mistaken, *Noding* v. *Alliston*, 14 Jur. 904; *Lloyd* v. *Roberts*, 12 Moo. P. C. 158. In *Shield* v. *Shield*, 4 No. Cas. 647, the will not being opposed, probate was granted although one of the attesting witnesses had no recollection of the matter and the other attesting witness gave evidence negativing its due execution. Where one witness was dead and the other swore that the paper was blank at the time of execution, the will, being perfect on the face of it, and the testator being a solicitor, was upheld by the Court, although the testator's wife and children (who, however, had for many years lived apart from him) were excluded from all benefit, *Lloyd* v. *Roberts*, *sup.*

Evidence negativing compliance with provisions of s. 9; —may be rebutted.

The execution of a will may be supported on the evidence of one witness, that of the other having been discredited, *Farmer* v. *Brock*, D. & Sw. 187. And the testimony of one subscribing witness was held sufficient though the other deposed that the testator had not signed in his presence, *Gove* v. *Gawen*, 3 Cur. 151. In that case the attendant circumstances favoured the supposition of a valid execution, there being a formal attestation clause, and the first witness having deposed to the due execution of the will a few days after it was made, while the second was not examined until two years and a half afterwards. See also *Wright* v. *Rogers*, L. R. 1 P. & D. 678; 38 L. J. P. 67; 21 L. T. 156. But in *Mackenzie* v. *Yeo*, 3 Cur. 125, the evidence of one witness was held insufficient to support a codicil, the attendant circumstances being suspicious. And where one witness deposed that the will was executed by the testator after the witness had signed, and the other witness deposed that the will was not executed in the presence of the two witnesses, and the attestation clause was imperfect, probate was refused, *Pennant* v. *Kingscote*, 3 Cur. 642. See also *Young* v. *Richards*, 2 Cur. 373; *Chambers* v. *Queen's Proctor*, *ib.* 433. And where the evidence of the witnesses is not clear, the testimony of a third person who, though not a subscribing witness, was present during the ceremony of execution will be received in support of, or in opposition to, probate, *Bayliss* v. *Sayer*, 3 No. Cas. 22; *Bennett* v. *Sharp*, 1 Jur. N. S. 456. See also *In b. Attridge*, 6 No. Cas. 598.

Evidence of one witness.

Evidence conflicting.

Evidence not clear.

If the testator has had experience in the execution of wills, this is an attendant circumstance favourable to the presumption of due execution, *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Brenchley* v. *Still*, 2 Rob. 162; *Blake* v. *Knight*, 3 Cur. 562. The evidence of illiterate witnesses to a will, as to the details of the ceremony, is received with caution, *Cooper* v. *Bockett*, 4 Moo. P. C. 419; 59 R. R. 371; but if the attendant circumstances are free from suspicion, a will will not be set aside

Experience in attesting wills.

Illiterate witnesses.

§ 9. the testator (*u*), but no form of attestation shall be necessary (*x*).

Evidence confused and indefinite.

though the testimony of the witnesses is confused or indefinite, or even that of one of the witnesses adverse, *Bayliss* v. *Sayer*, 3 No. Cas. 22; *Brenchley* v. *Still*, 2 Rob. 162; *Gove* v. *Gawen*, 3 Cur. 151; *Keating* v. *Brooks*, 4 No. Cas. 253; *In b. Mustow*, 4 No. Cas. 289; *Wright* v. *Sanderson*, 9 P. D. 149; 53 L. J. P. 49; 50 L. T. 769.

(*u*) The witnesses "*shall attest and shall subscribe the will in the presence of the testator.*" Where a will was prepared in duplicate, one copy signed by the testator and the other by the witnesses, neither copy separately, nor the two together, could be admitted to probate, *In b. Hatton*, 6 P. D. 204; 50 L. J. P. 78.

Will contained in several loose sheets.

When several sheets of paper, constituting a connected (though not in all points a consistent) disposal of property, are found together, the last sheet being duly executed, the presumption in the absence of direct proof is that they all formed the will of the deceased at the time of execution, *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J. P. 77. As to the dangers which may arise from a will being contained in several sheets of paper, see *Leonard* v. *Leonard*, '02, P. 243; 71 L. J. P. 117; 87 L. T. 145.

Witnesses.

In the attesting of a will, the mark of a witness is sufficient, *In b.*

Mark, good.

*Ashmore*, 3 Cur. 756; and this is true, even if the witness can write, *In b. Amiss*, 2 Rob. 116.; and although a wrong surname was affixed by the testator to the mark of a witness, his attestation was held good,

Wrong name.

*In b. Ashmore*, *ubi sup.* Where a witness, intending to write his own name, writes a wrong one by mistake, or writes words sufficient and intended to identify himself as the person attesting, the attestation is good, *In b. Olliver*, 2 Ecc. and Ad. Rep. 57; *In b. Sperling*, 3 Sw. & Tr. 272; 33 L. J. P. 25; 9 L. T. 348; but where, by desire of the testator, a woman signed her husband's name not intending thereby to represent her own signature, the attestation was held bad, *Pryor* v. *Pryor*, 29 L. J. P. 114; and see *In b. Cope*, 2 Rob. 335; *In b. White*, 2 No. Cas.

Initials, good.

461; *In b. Leverington*, 11 P. D. 80; 55 L. J. P. 62. The signature of a witness by his initials is a good attestation, *In b. Christian*, 2 Rob. 110; *In b. Hinds*, 16 Jur. 1161; *In b. Blewitt*, 5 P. D. 116; 49 L. J. P. 31; 42 L. T. 329; *Margary* v. *Robinson*, 12 P. D. 8; 56 L. J. P. 42;

Seal, bad.

57 L. T. 281; but his seal is not, *In b. Byrd*, 3 Cur. 117. The hand of

Witness's hand may be guided.

a witness who cannot write may be guided, *Harrison* v. *Elvin*, 3 Q. B. 117; 61 R. R. 153; *In b. Frith*, 1 Sw. & Tr. 8; 27 L. J. P. 6; *Lewis* v. *Lewis*, 2 Sw. & Tr. 153; 4 L. T. 583. If a witness cannot write and his

Name written for him, he making no mark.

name be written for him, he making no mark to be afterwards recognised upon the will, the attestation is bad, *In b. Mead*, 1 No. Cas. 456; *In b. Cope*, 2 Rob. 335. The same is true where the witnesses are husband

For note (*x*) see p. 28.

§ 9.

and wife, and the husband signs for the wife, *In b. White*, 2 No. Cas. 461; and one witness cannot subscribe for the other, *ib.*

A paper is not entitled to probate unless the Court is satisfied that the names of the alleged witnesses were subscribed for the purpose of attesting the testator's signature; a subscription *alio intuitu* will not suffice, *In b. Wilson*, L. R. 1 P. & D. 269; 36 L. J. P. 1; 15 L. T. 191; *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300; 41 L. J. P. 14; 25 L. T. 574.

If the witnesses are dead, it will not be presumed that they did not both sign at the same time from a difference in the colour of the ink, *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156; 2 L. T. 519.

Witness's acknowledgment of prior signature, bad.

The acknowledgment of a prior signature, though good if made by a testator, is bad in the case of a witness; thus the acknowledgment by a witness of his signature made on the occasion of a previous informal execution of the will, and the signature at the same time in his presence by a second witness, form together an insufficient attestation, *Moore* v. *King*, 3 Cur. 243, and cases referred to *ante*, p. 21. And if, on the re-execution of a will, a witness with a dry pen traces over his previous signature, this, though good as an acknowledgment in the case of a testator, is, as to a witness, bad, *Playne* v. *Scriven*, 1 Rob. 772; *In b. Trevanion*, 2 Rob. 311; *In b. Simmonds*, 3 Cur. 79; *In b. Cunningham*, 4 Sw. & Tr. 194; 29 L. J. P. 71; the Act requiring something to be done by the witness which shall be apparent on the face of the will. The addition on the re-execution of a will of the word "Bristol," the place of residence of one of the witnesses who was a witness to both executions, is not a good attestation of the second execution, *In b. Trevanion*, *ubi sup.*

Tracing over previous signature, bad.

There must be the name of witness or a mark intended to represent it.

To make a valid subscription and attestation, there must be either the name of the witness or some mark intended to represent it; the correction of an error in a previous writing of the name, or the addition of a date to it, is not sufficient: thus where, under circumstances similar to those in *In b. Trevanion*, a witness, one of whose christian names was "Frederick," put a cross to the letter "F" of his first signature, the second attestation was held bad, *Hindmarsh* v. *Charlton*, 8 H. L. C. 160; 4 L. T. 125. See also *In b. Eynon*, L. R. 3 P. & D. 92; 42 L. J. P. 52; 29 L. T. 45; *In b. Maddock*, L. R. 3 P. & D. 169; 43 L. J. P. 29; 30 L. T. 696; *In b. Leverington*, 11 P. D. 80; 55 L. J. P. 62. In *In b. Maddock*, *ubi sup.*, a witness wrote his christian name, but was unable, through feebleness, to sign his surname, and the attestation was held insufficient on the ground that the witness did not intend the mere christian name to be a complete signature. A valid execution is not destroyed by subsequent mistakes, *In b. Savory*, 15 Jur. 1042, as by alterations or erasures made in error, *In b. Hannam*, 7 No. Cas. 437; *In b. Redding*, 14 Jur. 1052, or by the cutting off of one of the witnesses' names for the purpose of its being re-written, *In b. Tozer*, 7 Jur. 134. See also *In b. Coleman*, 2 Sw. & Tr. 314; 30 L. J. P. 170; 5 L. T. 119.

Evidence of

The execution of a will may be proved on the evidence of one only of

§ 9.

the execution of a will.

the attesting witnesses. By the practice of the Prerogative Court, the evidence of both the witnesses to a will was necessary. But the question as to evidence is now governed by 20 & 21 Vict. c. 77, s. 33, which enacts that the rules of evidence observed in the common law courts are to be observed in the Court of Probate, *Belbin* v. *Skeats*, 1 Sw. & Tr. 148; 27 L. J. P. 56. With respect to wills relating to real estate, however, it is the invariable practice of equity courts to require the examination of all the witnesses who can be called; and this practice now obtains in all courts, 2 Taylor on Evidence, 1270.

Attestation, form of.

(*r*) "*No form of attestation shall be necessary.*" This applies to wills in execution of powers (Sugd. Pow. 243), as well as to other testamentary instruments. The mere subscription of the witnesses, without a word in addition to their names, is sufficient, *Bryan* v. *White*, 2 Rob. 315; *In b. Thomas*, 1 Sw. & Tr. 225; 28 L. J. P. 33. See Sugd. R. P. Stat. 333; 2 Hayes, Conv. 642.

A full attestation clause, though not absolutely necessary, is useful and desirable for the purposes of probate, inasmuch as the presumption of due execution is much stronger where there is a full and due attestation clause than where there is not, as abundantly appears from the authorities already referred to. If the formalities of execution are not stated to have been complied with, they must be proved, if proof can be obtained, and if not, the absence of proof accounted for, *In b. Diaper*, 3 N. R. 215. The presumption of due execution arising from a formal attestation clause may of course be negatived by evidence of the actual circumstances of the execution, *Croft* v. *Croft*, 4 Sw. & Tr. 10; 34 L. J. P. 44; 11 L. T. 781. If another person than the testator signs for him, that fact should, to save trouble in obtaining probate, be mentioned in the attestation. The position of the attestation clause, should there be one, appears to be unimportant, *In b. Davis*, 3 Cur. 748; *In b. Chamney*, 1 Rob. 757; in the latter case, an attestation clause on the fourth side of a sheet of paper folded bookwise, the whole will and the testator's signature being on the first side, was held good. See also *Roberts* v. *Phillips*, 4 E. & B. 450; 24 L. J. Q. B. 171; 99 R. R. 553; *In b. Braddock*, 1 P. D. 433; 45 L. J. P. 96; *In b. Streatley*, '91, P. 172; 60 L. J. P. 56; *Lewis* v. *Lewis*, '08, P. 1; 77 L. J. P. 7; 98 L. T. 58. But, in *In b. Taylor*, 2 Rob. 411, where there were two testamentary dispositions on the same sheet of paper, signed by the testatrix at the same time, and the witnesses subscribed their names only to the first in order, it was held that they attested the first only, and probate of the second was refused. If a will is on several sheets, all of which are signed by the testator and witnesses except the last, which is signed by the testator only, the execution is bad, *Ewen* v. *Franklin*, D. & Sw. 7; *Phipps* v. *Hale*, L. R. 3 P. & D. 166; *à fortiori*, where the last sheet is signed by the witnesses only, *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. 42; 11 L. T. 749.

In *In b. Braddock*, *ubi sup.*, the witnesses to the execution of a codicil

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. And be it further enacted, That no appointment (*y*) made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required; and

Appointments by will to be executed like other wills,

signed their names on the back of a will to which the codicil was attached by a pin. The Court decreed probate of the codicil, being satisfied that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil.

(*y*) A power to appoint by writing under the hand and seal of the donee is not well exercised by the will of the donee executed and attested according to the provisions of the 9th section, but unsealed, *West* v. *Ray*, Kay, 385; *Taylor* v. *Meads*, 4 D. J. & S. 597; 34 L. J. Ch. 203; 12 L. T. 6. See Sugd. Pow. 217; 4 Dav. Conv. 31.

Appointment by writing under hand and seal.

That a will is a "writing," within the meaning of a power to appoint "by writing," see *Taylor* v. *Meads*, *ubi sup.* Consequently a power to appoint "by writing under hand and seal" is well exercised by a will duly signed, attested, and sealed, *Smith* v. *Adkins*, L. R. 14 Eq. 402; 41 L. J. Ch. 628; 27 L. T. 90; *In re Greaves' Settlement Trusts*, 23 Ch. D. 313; 52 L. J. Ch. 753; 48 L. T. 414; and it is submitted that a power to appoint "by will under hand and seal," or "by writing, testamentary or otherwise, under hand and seal," would fall within this section of the Wills Act, and be well exercised by will duly signed and attested, without the addition of a seal.

Will under seal; effect of, in exercising a power.

But the Act is confined to the mode of execution and attestation; and in regard therefore to all other matters, though relating to the quality or perfection of the instrument, as enrolment, registration, engrossment on parchment, indentation, or any similar requisite, however whimsical (for of such requisites whimsicality is the essence), it would seem that the terms of the power must be pursued as before; and of course this remark applies *à fortiori* to matters relating to the time or the place of execution, 1 Hayes, Conv. 367.

The Act is confined to the requisites of execution and attestation.

A power to appoint by writing under hand or by will is not well exercised by a document of a testamentary character signed by the donee, but unattested, *Re Daly's Settlement*, 25 Be. 456.

Unattested writing, bad.

A power to appoint by will "signed and published in the presence of and attested by three or more witnesses" was held to be well executed by will made and published and signed in the presence of and attested by three witnesses, although the attestation took no notice of the publication, *Re Wrey's Trust*, 17 Sim. 201.

Wills in exercise of powers must comply with the requirements of this section, notwithstanding 24 & 25 Vict. c. 114, *Re Kirwan's Trusts*, 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292.

The 12th section of 22 & 23 Vict. c. 35 (as to the mode of execution of powers), does not apply to powers to be executed by will.

22 & 23 Vict. c. 35, s. 12.

§ 10. and to be valid, although other required solemnities are not observed.

every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will notwithstanding it shall have been (*z*) expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

WILLS OF SOLDIERS AND SEAMEN.

Soldiers' and mariners' wills excepted.

XI. Provided always and be it further enacted, That any (*a*) soldier (*b*) being in actual military service (*c*), or any

(*z*) This section relates to powers created since, as well as to powers created before, the Act, *Hubbard* v. *Lees*, L. R. 1 Ex. 255; 35 L. J. Ex. 169; 14 L. T. 367.

Minor. (*a*) This provision, extending to *any* soldier on service or seaman at sea, overrides the provision of sect. 7, that no will made by *any* person under twenty-one shall be valid. Thus, the informal will of a minor, written in pencil on the battlefield of Aliwal after he was mortally wounded, was held valid, *In b. Farquhar*, 4 No. Cas. 651; and in *In b. M'Murdo*, L. R. 1 P. & D. 540; 37 L. J. P. 14; 17 L. T. 393, the testator, a seaman, was under twenty-one when the will was executed.

Soldier. (*b*) That the term "soldier" in this section extends to non-combatants, and is not limited to soldiers of the King, see *In b. Donaldson*, 2 Cur. 386.

Will invalid. (*c*) The construction of the 11th section of the Act was discussed in *Drummond* v. *Parish*, 3 Cur. 522; the unattested will of Major-General Drummond, who died at Woolwich whilst holding the office of Director-General of Artillery, and on full pay, was not within the exception of the 11th section. That decision was followed in the case of an officer in barracks with his regiment at St. Johns, New Brunswick, and probate of his will, informally executed, was refused, *White* v. *Repton*, 3 Cur. 818; also in the case of an officer in his Majesty's service, who was in command of the Mysore division of the late East India Company's forces, and died in India whilst on a tour of inspection, *In b. Hill*, 1 Rob. 276; and in the case of a sergeant with his regiment at Malta, under orders for the West Indies, *In b. Norris*, 3 No. Cas. 197. See also *In b. Thorne*, 4 Sw. & Tr. 36; 34 L. J. P. 131; 12 L. T. 639. But see *In b. Phipps*, 2 Cur. 368.

Will valid. But where an officer in India died whilst passing from one regiment to another, both regiments being in active service, his informal will, contained in a letter to his brother, was admitted to probate, *Herbert* v. *Herbert*, D. & Sw. 12. And an unsigned memorandum indorsed on a duly executed will, the memorandum having been written soon after

mariner or seaman being at sea (*d*), may dispose of his § 11.

the testator had received a mortal wound in battle, was admitted to probate, *In b. Churchill*, 4 No. Cas. 47.

The meaning of "actual military service" has been discussed quite recently in *In b. Hiscock*, '01, P. 78; 70 L. J. P. 22; 84 L. T. 61; *Gattward* v. *Knee*, and *May* v. *May*, '02, P. 99, 103; 71 L. J. P. 34; 86 L. T. 119, 120. See also *In b. Scott*, '03, P. 243; 73 L. J. P. 17; 89 L. T. 588.

To obtain probate of the unattested will of a soldier, there must be the affidavits of two disinterested persons to prove the handwriting of the deceased, *In b. Neville*, 4 Sw. & Tr. 218; 28 L. J. P. 52; and in the case of an illiterate soldier's will, there must be proof that the will was read over to the deceased, or that he had full knowledge of its contents, *In b. Hackett*, 4 Sw. & Tr. 220; 28 L. J. P. 42. But see *In b. Prendergast*, 5 No. Cas. 92.

Alterations.

Where an unattested holograph will of a soldier, in actual service at the date of the will, contained alterations about the making of which no information was obtainable, the alterations were presumed to have been made during the continuance of the military service, and were included in the probate, *In b. Tweedale*, L. R. 3 P. & D. 204; 44 L. J. P. 35; 31 L. T. 799.

Sailor.

(*d*) The purser of a man-of-war is a "seaman" within this section, *In b. Hayes*, 2 Cur. 338; so is a surgeon in the navy, *In b. Saunders*, L. R. 1 P. & D. 16; 35 L. J. P. 26; 13 L. T. 411. The whole service would seem to be included, 1 Wms. Exors. 92.

Sailor at sea.

The informal will of an admiral, made on board a King's ship in a river, whilst engaged on an expedition against an enemy, *In b. Austen*, 2 Rob. 611; the informal will of a seaman in his Majesty's service, who went on shore whilst his vessel was in harbour at Buenos Ayres and there died by an accident, *In b. Lay*, 2 Cur. 375; the informal will of a surgeon in the navy, made on board ship when he was not on duty, but returning from service, *In b. Saunders*, L. R. 1 P. & D. 16; 35 L. J. P. 26; 13 L. T. 411; the will of the mate of a man-of-war permanently stationed in Portsmouth harbour, made whilst serving on board, *In b. M'Murdo*, L. R. 1 P. & D. 540; 37 L. J. P. 14; 17 L. T. 393; and the testamentary dispositions of a sailor written on a ship lying in a river, and before the ship has actually sailed, *In b. Patterson*, 79 L. T. 123, have been admitted to probate as wills of "seamen at sea."

But the will of the admiral of the Jamaica naval station was declared not within the saving of the Statute of Frauds, 29 Car. 2, c. 3, s. 23; *Earl of Euston* v. *Seymour*, cited 2 Cur. 339; 3 Cur. 530; the will having been made in the admiral's house on shore and not "at sea."

Merchant seaman.

An unattested letter written by a seaman in the merchant service from his vessel lying in Margate Roads, containing a disposition of his property, was admitted to probate, *In b. Milligan*, 2 Rob. 108; so was a

§ 11. personal estate as he might have done before the making of this Act (*e*).

PETTY OFFICERS, SEAMEN AND MARINES.

XII. [Repealed by 28 & 29 Vict. c. 112] (*f*).

---

letter written by the master of a vessel from a port at which he had touched in his voyage, *In b. Parker*, 2 Sw. & Tr. 375; 28 L. J. P. 91; so were entries in pencil of a testamentary character made in the course of a voyage to Valparaiso by a merchant seaman in an "abstract book" or log book, *In b. Thompson*, 5 No. Cas. 596.

But the letters of a seaman written in port on the day he was shipped, the vessel not sailing until fifteen days after, were not admitted to probate, *In b. Corby*, 18 Jur. 634. And a mariner's will commencing "if I die at sea or abroad," which did not happen, was held to be conditional and was pronounced against, *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; 42 L. J. P. 32; 27 L. T. 322.

Soldier. (*e*) The will of a soldier made during actual service, and not expressly revoked, remains operative, though the testator lives in England several years after the date of the will, *Re Leese*, 17 Jur. 216; a testamentary privilege apparently more extensive than that allowed under the Roman law, Inst. ii. Tit. xi.; see also Cod. Nap. § 984.

To obtain probate under sect. 11 the motion must be supported by a statement of the facts, to enable the Court to judge whether or not the will is entitled to the privilege or comes within the scope of the section.

It will be observed that this section applies only to personal estate; a will of real estate must in every case be executed in accordance with sect. 9. A question may arise as to the effect of sects. 1, 2, and 3 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), in a case where a personal representative is constituted by a will which, by virtue of this section, is executed sufficiently as to personal estate, but insufficiently as to real estate.

(*f*) Better provision respecting wills of seamen and marines of the Royal Navy and Marines has been made by The Navy and Marines (Wills) Act, 1865 (28 and 29 Vict. c. 72) which statute, as amended by 60 Vict c. 15, is as follows:—

28 & 29 VICT. C. 72.*

*An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines.* [29th June, 1865.]

Be it enacted by the Queen's most excellent Majesty, by and with

---

* Amended by 60 Vict. c. 15, with respect to persons dying after 3rd June, 1897.

§ 12.

the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title. 1. This Act may be cited as the Navy and Marines (Wills) Act, 1865.

Interpretation of terms. 2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral.

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

Will made before entry ineffectual as to wages, &c. 3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

Will invalid if combined with power of attorney. 4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

Regulations for wills of seamen, &c., as to wages, &c. 5. A will made after the commencement of this Act by any person while serving as a seaman or marine, [*or when he has ceased so to serve*,*] shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or marines or seamen at sea:

(2.) Where the will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force:

(3.) Where the will is made elsewhere than on board one of

* Repealed with respect to persons dying after 3rd June, 1897 (60 Vict. c. 15).

§ 12.

her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public [or a solicitor, or in Scotland a law agent *] :

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England ; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills made by prisoners of war.

**6.** Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions :

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public :

(2.) If the will is made according to the forms required by the law of the place where it is made :

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

Payment under will, not in conformity with Act.

**7.** Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any affects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if having regard

* These words to be added with respect to persons dying after 3rd June, 1897 (60 Vict. c. 15).

PUBLICATION.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof (*g*). Publication not to be requisite.

ATTESTING WITNESSES' COMPETENCY.

XIV. And be it further enacted, That if any person who shall attest the execution of a will shall, at the time of the execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. Will not to be void on account of incompetency of attesting witness.

GIFTS TO ATTESTING WITNESSES.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial (*h*) devise legacy estate interest gift Gifts to an attesting witness to be void.

---

to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

**8.** This Act shall commence on such day, not later than the 1st day of January, 1866, as her Majesty in Council thinks fit to direct; nevertheless her Majesty in Council may, if it seems fit, with reference to any places out of the United Kingdom, direct that this Act do not commence there respectively until a time after that day, and with respect to every such place the time so appointed shall be deemed the time of the commencement of this Act. Commencement of Act.

**9.** Every Order in Council under this Act shall be published in the London Gazette, and shall be laid before both houses of parliament within thirty days after the making thereof, if parliament is then sitting, and if not, then within thirty days after the next meeting of parliament. Publication of Orders in Council.

(*g*) It is not necessary for the testator to inform the witnessess of the testamentary nature of the document which they are about to sign; and if he deceives the witnesses on this point, and leads them to believe that such document is a deed, the execution will be good, Sugd. R. P. Stat. 339, 340; H. Sugd. Wills, 140; 1 Hayes, Conv. 365. See also, *ante*, p. 20. Publication.

(*h*) This section altered the law with respect to the admissibility of witnesses in two ways: first, by destroying the distinction between real As to witnesses.

§ 15. or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise legacy estate interest gift or appointment shall,

---

and personal estate; for, as a will of personalty did not require any witness, a gift to an attesting witness of such a will was not void under 25 Geo. 2, c. 6, *Emanuel* v. *Constable*, 3 Rus. 436; and secondly, by extending the provisions of 25 Geo. 2, c. 6, to the wives and husbands of attesting witnesses.

Gifts to witnesses.

Where a will was attested by two marksmen, and signed also by two other persons as witnesses, a gift to the wife of one of the signing witnesses failed, *Wigan* v. *Rowland*, 11 Ha. 157; 90 R. R. 619. A will was written on three sides of a sheet of paper; the testator W. R. and two persons, J. T. G. and J. S. H., signed the first and second sides; at the bottom of the third side was written, "Witness my hand and seal, W. R. (Seal). Witness J. T. G., J. S. H."; on the fourth side was the following memorandum, "This will and testament was signed in our presence, and in the presence of each other by him. Witness thereto, J. T. G., J. S. H., G. B." G. B. signed the memorandum at the request of the testator's wife, who was present, notwithstanding an objection by the testator that such signature was unnecessary; it was held that G. B. had not attested the will so as to preclude her from taking any interest under the will, *Randfield* v. *Randfield*, 8 H. L. C. 228, n.; and see *In b. Sharman*, L. R. 1 P. & D. 661; 38 L. J. P. 47; 20 L. T. 683. See also *In re Toker*, 4 L. T. 183; *Re Harlin*, *ib.* 839; *Fell* v. *Biddulph*, L. R. 10 C. P. 701; 44 L. J. C. P. 402; 32 L. T. 864; *In b. Mitchell*, 2 Cur. 916; *In b. Forest*, 2 Sw. & Tr. 334; 31 L. J. P. 200; 5 L. T. 689; *Burton* v. *Newbery*, 1 Ch. D. 234; 45 L. J. Ch. 202; 34 L. T. 15; and see sect. 17. Where a solicitor who is an attesting witness is by the will appointed a trustee and authorised to charge profit-costs in respect of any work in relation to the estate, which he could not have done except for the authority to do so contained in the will, this authority confers a bounty, and as he is an attesting witness, he will be precluded by this section from taking advantage of it, *In re Pooley*, 40 Ch. D. 1; 58 L. J. Ch. 1; 60 L. T. 73. A legacy, annuity, or residue bequeathed by will to A. is not affected by the attestation by A. of a codicil to the will; and this is true, even though the codicil, by revoking legacies given by the will, indirectly increases the amount of the residue, *Gurney* v. *Gurney*, 3 Drew. 208; 24 L. J. Ch. 656; 106 R. R. 314; *Tempest* v. *Tempest*, 2 K. & J. 635; see also *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. The subsequent marriage of a witness to a person entitled to the benefit of a devise does not render that devise null, *Thorpe* v. *Bestwick*, 6 Q. B. D. 311; 50 L. J. Q. B. 320; 44 L. T. 180. Where a legatee under a will attests it, and the testator afterwards confirms his will by a codicil duly

As to attesting a codicil.

Subsequent marriage of witness to devise.

so far only as concerns such person attesting the execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be

§ 15.

executed and attested by other witnesses, this will have the effect of entitling the legatee to receive his legacy, *Anderson* v. *Anderson*, L. R. 13 Eq. 381; 41 L. J. Ch. 247. Also a person to whom a gift is made by a will to which he is an attesting witness, and whose title to the gift is revived by a codicil which refers to the will but to which he is not an attesting witness, does not lose the benefit so conferred upon him by his attesting a subsequent codicil referring to and confirming the will and the preceding codicil, *In re Trotter*, '99, 1 Ch. 764; 68 L. J. Ch. 363; 80 L. T. 647. Subsequent codicil.

In *Jull* v. *Jacobs*, 3 Ch. D. 703; 35 L. T. 153, the tenant for life under the will was an attesting witness; the remainders were accelerated, and took effect immediately upon the testator's death; but in that case the persons entitled in remainder were in existence, and their interests had been postponed only in order that the attesting witness might have the life estate. *In re Townsend's Estate*, 34 Ch. D. 357; 56 L. J. Ch. 227; 55 L. T. 674, the remainders after the void life estate were only contingent on the tenant for life dying without leaving issue living at his death. At the decease of the testator, the tenant for life had yet no children. The contingent remainders were not accelerated; and the income was held to be undisposed of till the birth of a child of the tenant for life, when the principle of *Jull* v. *Jacobs* would apply. See also *In re Clark*, 31 Ch. D. 72; 55 L. J. Ch. 89; 53 L. T. 591, where the remainders were accelerated; and compare *Aplin* v. *Stone*, '04, 1 Ch. 543; 73 L. J. Ch. 456; 90 L. T. 284, where there was an absolute gift to the wife of an attesting witness, with an alternative contingent gift to her children in the event of her being dead at the period of distribution. Life tenant attesting witness, effect on remainders.

Where there is a gift to several as joint tenants, one of whom is an attesting witness and thereby forfeits his interest, the statute does not create a severance of the joint tenancy, but the whole gift goes to the others, *Young* v. *Davies*, 2 Dr. & S. 167; 32 L. J. Ch. 372; 8 L. T. 80; *In re Fleetwood*, 15 Ch. D. 594; 49 L. J. Ch. 514; so, also, where the gift is to a class, *Fell* v. *Biddulph*, L. R. 10 C. P. 701; 44 L. J. C. P. 402; 32 L. T. 864. Gift to joint tenants, or a class.

A devise or bequest to a witness, to be null and void, must be beneficial, so that in the case of a gift of property upon trust, the gift is not void, *In b. Ryder*, 2 No. Cas. 462; *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69; 37 L. J. Ch. 521; 18 L. T. 392. See also *In b. Mitchell*, 2 Cur. 916; *In b. Forest*, 2 Sw. & Tr. 334; 31 L. J. P. 200; 5 L. T. 689; *Burton* v. *Newbery*, 1 Ch. D. 234; 45 L. J. Ch. 202; 34 L. T. 15; and see sect. 17. Devise of property in trust.

§ 15. admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof, notwithstanding such devise legacy estate interest gift or appointment mentioned in such will (*i*).

CREDITOR ATTESTING WITNESS.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor or the wife or husband of any creditor whose debt is so charged shall attest the execution of such will, such creditor (*k*), notwithstanding such charge, shall be admitted a witness to prove the execution of such will or to prove the validity or invalidity thereof.

EXECUTOR ATTESTING WITNESS.

Executor to be admitted as witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof (*l*).

REVOCATION BY MARRIAGE.

Will to be revoked by marriage.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (*m*)

---

Evidence Acts.

(*i*) The Wills Act is expressly exempt from the operation of the Law of Evidence Acts, 6 & 7 Vict. c. 85 (see sect. 1), and 14 & 15 Vict. c. 99 (see sect. 5).

(*k*) It would seem that there is here an accidental omission of the words "or the wife or husband of such creditor." But notwithstanding this verbal omission, the wives and husbands of creditors whose debts are charged by the will would, by construction, be admissible witnesses.

(*l*) Of course, an executor who attested the will would forfeit all beneficial interest thereunder, by force of sect. 15, *Hoare* v. *Osborne*, 33 L. J. Ch. 586; 10 L. T. 258.

Revocation by marriage.

(*m*) Marriage on the day of, but subsequent to, the execution of a will operates as a revocation, even though it appear from the will itself that the testator did not intend it to take effect until after the marriage, *Otway* v. *Sadleir*, 4 Ir. Jur. N. S. 97; followed in *Bucknall* v. *Cooper*, in the Prob. Div., Dec. 1875. Sect. 18 of the Wills Act does not apply to the wills of foreigners domiciled abroad. But the will of a foreign

(except a will made in exercise of a power of appointment (*n*) when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir customary heir executor or administrator or the person entitled as his or her next of kin (*o*) under the Statute of Distributions). § 18.

REVOCATION BY PRESUMPTION.

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*p*). No will to be revoked by presumption.

REVOCATION BY SUBSEQUENT WILL OR CODICIL OR DESTRUCTION OF INSTRUMENT.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as afore- No will to be revoked but by another will or codicil, or writing, or by destruction.

testator, made in accordance with the law of his own country, is revoked by marriage, if his domicile is English at the time of his marriage, *In re Martin*, '00, P. 211; 69 L. J. P. 75; 82 L. T. 806.

(*n*) As to this exception, see *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *In b. Fenwick*, L. R. 1 P. & D. 319; 36 L. J. P. 54; 16 L. T. 124; *In b. Fitzroy*, 1 Sw. & Tr. 133; Sugd. R. P. Stat. 348. If by the same instrument the testator disposes of his own property, and exercises a power falling within the exception, it will be revoked by subsequent marriage, so far as relates to the testator's property, but will be unrevoked so far as relates to the property the subject of the power, *In b. Russell*, 15 P. D. 111; 59 L. J. P. 80; 62 L. T. 644. Marriage no revocation, when.

(*o*) See *In b. M'Vicar*, L. R. 1 P. & D. 671; 38 L. J. P. 84; 20 L. T. 1013, where the property, in default of appointment, would have gone to the "next of kin," not the next of kin under the statute.

(*p*) Where a testator by will dated in 1869, in express exercise of a power contained in his marriage settlement, made certain appointments, and in 1878 executed a deed of appointment which removed four-fifths of the appointed fund from the operation of the will, but which did not purport to revoke the will in any way, it was held that the will remained in force under this section, and operated as to one of the appointments under the deed of 1878 which proved to be in excess of the power, *In re Wells*, 42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588. See the note to sect. 23.

**§ 20.** said, or by another (*q*) will or codicil executed in manner

Will may be made up of several separate and substantive documents.

(*q*) A testator's testamentary dispositions may be comprised in several separate and substantive documents, *In b. Luffman*, 5 No. Cas. 183; *Foley* v. *Vernon*, 7 No. Cas. 119. Writings appointing executors, *Richards* v. *Queen's Proctor*, 18 Jur. 540; or beginning "This is my last will," *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; 105 R. R. 31; *Freeman* v. *Freeman*, 5 D. M. & G. 704; 23 L. J. Ch. 838; 104 R. R. 245; *Stoddart* v. *Grant*, 1 Macq. 163; but containing no revoking clause, are not necessarily substantive wills in the sense that, if there be two such writings, the latter will revoke the earlier in date. See also *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; 35 L. J. P. 28; 13 L. T. 508; *In b. Fenwick*, L. R. 1 P. & D. 319; 36 L. J. P. 54; 16 L. T. 124; *In b. de la Saussaye*, L. R. 3 P. & D. 42; 42 L. J. P. 47; 28 L. T. 368; *In b. Petchell*, L. R. 3 P. & D. 153; 43 L. J. P. 22; 30 L. T. 74; *Hellier* v. *Hellier*, 9 P. D. 237; 53 L. J. P. 105; *Simpson* v. *Foxon*, '07, P. 54; 76 L. J. P. 7; 96 L. T. 473. But where there were two well-executed substantive and inconsistent wills, one of 1838, the other of 1839, the latter, disposing of the whole of the testator's property, though containing no clause of revocation, nor any appointment of executors, was held to have revoked the former, *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; 59 R. R. 331; see also *In b. Lady E. M. Montagu*, 7 No. Cas. 292; the intention to revoke the earlier may be inferred from the general tenor of the later will, *Dempsey* v. *Lawson*, 2 P. D. 98; 46 L. J. P. 23; 36 L. T. 515; *Chichester* v. *Quatrefages*, '95, P. 186; 64 L. J. P. 79; 72 L. T. 475; *In b. Bryan*, '07, P. 125; 76 L. J. P. 30; 96 L. T. 584; if upon the face of the document the intention is doubtful, parol evidence of intention is admissible, *Jenner* v. *Ffinch*, 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; and statements of the testator, made before or after execution, are admissible to show what papers constitute the will, *Gould* v. *Lakes*, 6 P. D. 1; 49 L. J. P. 59; 43 L. T. 382. As to probate of documents not inconsistent, on a compromise, see *Robinson* v. *Clarke*, 2 P. D. 269; 47 L. J. P. 17; 39 L. T. 43.

Two substantive and inconsistent wills.

*Plenty* v. *West*.

Three testamentary papers.

A testator left three testamentary papers; the two last in date were alone admitted to probate, although they disposed but partially of his property, and the first in date, although it disposed of the whole of his property, was rejected, *Plenty* v. *West*, 1 Rob. 264; 22 L. J. Ch. 185; 77 R. R. 297. But the Court of Common Pleas (6 C. B. 201) certified that, as to the real estate, the last of the three papers alone constituted the last will; and this opinion was adopted by the M. R. (16 Be. 173).

Where probate is granted of two or more testamentary papers as together containing the last will of the deceased, the grant is made to all the executors named in the several papers, *In b. Morgan*, L. R. 1 P. & D. 323; 36 L. J. P. 64; 16 L. T. 181.

In *In b. Robarts*, L. R. 3 P. & D. 110; 42 L. J. P. 63; 28 L. T. 913, under special circumstances, probate was granted of a will and two

§ 20.

codicils, power being reserved to the executor (who gave an undertaking) to prove other codicils when they came to his hands.

Appointment, revocation of.

Difficult questions have arisen in cases where testators having powers of appointment have made wills in exercise of such powers, and have afterwards made other wills, not expressed to be in exercise of such powers, nor referring expressly thereto, nor to the former wills, nor disposing of the property comprised therein, but containing general revocatory clauses, or otherwise manifesting an intention to supersede all prior testamentary dispositions.

In *In b. Merritt*, 1 Sw. & Tr. 112, a married woman in 1846 duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855 she made another will disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, and named a different executor. *Held* that, notwithstanding the general revocatory clause, the will of 1846 was not revoked, the will of 1855 containing no reference to the power, nor to the property thereby appointed.

*In b. Meredith*, 29 L. J. P. 155, and *In b. Joys*, 4 Sw. & Tr. 214; 30 L. J. P. 169, were similar in their circumstances to *In b. Merritt*.

On the other hand, in *Sotheran* v. *Dening*, 20 Ch. D. 99, and in *In re Kingdon*, 32 Ch. D. 604; 55 L. J. Ch. 598; 54 L. T. 753, the first will was held to be revoked.

In *Sotheran* v. *Dening*, a married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband, she made another will revoking all former wills, and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will, also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment. *Held*, that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate went as in default of appointment.

In *In re Kingdon*, the power of appointment exercised by the first will was a special power, and in neither of the three later wills made by the testatrix did she in any way exercise, or affect to exercise, the power, nor did she refer to it, or to the property subject thereto. Nevertheless the first will was held to be revoked by general words of revocation contained in the three later wills. The words of revocation in the first and second of such later wills were: "I revoke all other wills," and in the third will: "I hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament."

Although *In b. Merritt*, *In b. Meredith*, and *In b. Joys*, cannot be said

§ 20. hereinbefore required, or by some writing (*r*) declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning tearing or otherwise destroying the same (*s*) by

---

to have been overruled by *Sotheran* v. *Dening*, and *In re Kingdon*, their principle would seem to have been much narrowed by those decisions. See also *In b. Eustace*, L. R. 3 P. & D. 183; 43 L. J. P. 46; 30 L. T. 909; and *Harvey* v. *Harvey*, 32 L. T. 141; 23 W. R. 478.

Abandonment. A will is not revoked by mere abandonment; to operate as a revocation, there must be some unequivocal act done, of the nature specified in the 20th section, *Andrew* v. *Motley*, 12 C. B. N. S. 514; 32 L. J. C. P. 128.

Revocation by a writing. (*r*) The section distinguishes between a will or codicil and "some writing": and a memorandum simply revoking a will, being only a writing, and not a will or codicil, is not entitled to probate, *In b. Fraser*, L. R. 2 P. & D. 40; 39 L. J. P. 20; 21 L. T. 680. In *In b. Durance*, L. R. 2 P. & D. 406; 41 L. J. P. 60; 26 L. T. 983, a letter duly attested, whereby the testator directed his brother to obtain his will and burn it, was held to be a writing within this section, and to have revoked the will, and administration was granted with the letter annexed. See also *Toomer* v. *Sobinska*, '07, P. 106; 76 L. J. P. 19; 96 L. T. 475. Where a testator had obliterated the whole of the codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses: "We are witnesses of the erasion of the above," it was held that these words were a "writing declaring an intention to revoke" the codicil, and that it was accordingly revoked, *In b. T. H. Gosling*, 11 P. D. 79; 55 L. J. P. 27.

See also as to the distinction between a "will" or "codicil," and a "writing declaring an intention to revoke a will," *Hawksley* v. *Barrow*, L. R. 1 P. & D. 147; 35 L. J. P. 67; 14 L. T. 672.

Cancelling. (*s*) The word "cancelling" was advisedly omitted from this section (Sugd. R. P. Stat. 353), contrary to the recommendation of the Real Property Commissioners (4 R. P. Com. Rep. Prop. 10, p. 81); and, therefore, probate will be granted of a will in its original shape, though a pen has been drawn through the body of the will, and through the testator's signature, the attestation clause, and the names of the witnesses, *Stephens* v. *Taprell*, 2 Cur. 458; *In b. Fary*, 15 Jur. 1114; *Shaw* v. *Thorne*, 4 No. Cas. 649. See also *In b. Brewster*, 29 L. J. P. 69; 6 Jur. N. S. 56; *In b. De Bode*, 5 No. Cas. 189. And the words "otherwise destroying" are not satisfied if the will remains actually uninjured, *Cheese* v. *Lovejoy*, 2 P. D. 251; 46 L. J. P. 66; 37 L. T. 294.

Mutilation of will. That a will may be revoked by tearing, it is not necessary to rend the will into more pieces than it originally consisted of; but it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act, *Elms* v. *Elms*, 1 Sw. & Tr. 155; 27 L. J. P. 96.

§ 20.

That a will may be revoked in part only, by tearing, see *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; 32 L. J. P. 73; 7 L. T. 801; *In b. Woodward*, L. R. 2 P. & D. 206; 40 L. J. P. 17; 24 L. T. 40; *In b. Maley*, 12 P. D. 134; 56 L. J. P. 112; 57 L. T. 500.

From the peculiar manner in which the mutilation (by cutting and tearing) of a duly executed will was made, the Court held the will not to be totally revoked, but to have been altered so as to form the draft for a new will, and probate was granted of the will as it stood after the mutilation, *Clarke* v. *Scripps*, 2 Rob. 563; and if the mutilation may have been accidental, the state of the paper will be considered, *Bigge* v. *Bigge*, 9 Jur. 192. Also probate may be granted of a will which has been torn up by a testator in a fit of intoxication, and afterwards pasted together again by him when sober, if it is clear that there was no intention to revoke the will, *In b. Brassington*, '02, P. 1; 71 L. J. P. 9; 85 L. T. 644.

By pen and ink.

By cutting.

But if parts of a will are obliterated by pen and ink so as to be illegible, *Townley* v. *Watson*, 3 Cur. 761; or cut away, as with a knife or a pair of scissors, *In b. Cooke*, 5 No. Cas. 390, there is a revocation as to the obliterated or destroyed parts. See also *In b. Lambert*, 1 No. Cas. 131.

Cutting out signature.

A will is revoked by the testator cutting out the signature, *Hobbs* v. *Knight*, 1 Cur. 768. And where the signature had been cut out, but gummed on its former place, the gumming on did not revive the will, *Bell* v. *Fothergill*, L. R. 2 P. & D. 148; 23 L. T. 323. A will found in the testatrix's repositories with her signature and that of the witnesses scratched out with a knife, there being at the bottom of the will a memorandum in her handwriting, but not executed, whereby, for reasons given, the will was declared to be cancelled, was held to be revoked, *In b. Morton*, 12 P. D. 141; 56 L. J. P. 96; 57 L. T. 501.

Dependent relative revocation.

If the mutilation of a will takes place with a view to the execution of a new will, and the new will be not executed, the prior will, as it stood before mutilation, will be entitled to probate, *In b. Cockayne*, D. & Sw. 177; *Elms* v. *Elms*, 1 Sw. & Tr. 155; 27 L. J. P. 96; see also *In b. Eeles*, 2 Sw. & Tr. 600; 32 L. J. P. 4; 7 L. T. 338; *In b. Smith*, 1 No. Cas. 315. So likewise where a will is destroyed or mutilated by the testator only because he supposes he has executed another will, *Onions* v. *Tyrer*, 1 P. W. 343; *Dancer* v. *Crabb*, L. R. 3 P. & D. 98; 42 L. J. P. 53; 28 L. T. 914. Where a will is destroyed on the incorrect assumption that a subsequent will is well executed and operative, the first will is not revoked, and secondary evidence of its contents will be admitted, *Scott* v. *Scott*, 1 Sw. & Tr. 258; *In b. Middleton*, 3 Sw. & Tr. 583; 34 L. J. P. 16; 11 L. T. 684. And see *Dixon* v. *Treasury Solicitor*, '05, P. 42; 74 L. J. P. 33; 92 L. T. 427.

Where a testator, having duly executed his will, subsequently, in the presence of his executor, partially erased his own signature, with the intention of writing it in better style, and thereupon wrote it again in

§ 20.

the presence of the executor, but not of the attesting witnesses, the instrument was admitted to probate, the original signature being taken as restored, *In b. Kennett*, 2 N. R. 461. A testratrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be re-copied, but she died before she could re-execute it. In the circumstances the codicil was admitted to probate, *In b. Thornton*, 14 P. D. 82; 58 L. J. P. 82; 61 L. T. 200.

A testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that certain funds comprised in a settlement made on his first marriage would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of the first marriage. In 1896 he executed a fresh will, revoking the will of 1895, and later, in 1896, he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896. It was held that the will of 1882 was, in law, a valid and subsisting testamentary document, and that it should be included with the three documents of 1896 in the probate, *Stamford* v. *White*, '01, P. 46; 70 L. J. P. 9; 84 L. T. 269.

*Animus revocandi.*

The act of destruction of a will must be done *animo revocandi*, and must be complete, in order that the will may be revoked. Therefore,

Will burnt by mistake, or in a fit of madness.

where a duly-executed will has been burnt by mistake, *In b. Thornton*, 2 Cur. 913; or by the testator in a fit of madness, *In b. Downer*, 18 Jur. 66; or *delirium tremens*, *Brunt* v. *Brunt*, L. R. 3 P. & D. 37; 28 L. T. 368; or where suffering from softening of the brain, *In b. Hine*, '93, P. 282; 63 L. J. P. 45; 69 L. T. 458; probate will be allowed of a copy or draft; or if a will is torn under the false impression that it is invalid, *Giles* v. *Warren*, L. R. 2 P. & D. 401; 41 L. J. P. 59; 26 L. T. 780. And where a will was executed by a testator when sane, and he subsequently became insane, and the will was found mutilated at his death, it was held that the *onus* of proof, that the testator mutilated his will whilst sane, lay upon those who contested the will, *Harris* v. *Berrall*, 1 Sw. & Tr. 153; and if the will cannot be found, and there is no evidence as to the date of its destruction, probate will be granted of the contents as contained in a copy, *Sprigge* v. *Sprigge*, L. R. 1 P. & D. 608; 38 L. J. P. 4; 19 L. T. 462. In *Mills* v. *Millward*, 15 P. D. 20; 59 L. J. P. 23; 61 L. T. 651, a will was destroyed in testatrix's presence, but against her wish. Subsequently, though pressed to make a new will she refused, saying that it must remain as it was. It was held that the will was not revoked, and that probate might be granted of the will as contained in an affidavit of the executor. Whether the testratrix could ratify such a destruction so as to make it a revocation within sect. 20, *quære*. See also *Gill* v. *Gill*, '09, P. 157; 78 L. J. P. 60; 100 L. T. 861. And where a testator, having duly executed a codicil to his last will, destroyed the will under the impression that it was of no further use, the Court admitted the contents of the will, as set forth in the draft thereof,

together with the codicil, to probate, *Beardsley* v. *Lacey*, 67 L. J. P. 35; 78 L. T. 25.

Cutting off witness's signature.

A will once well executed is not revoked by the cutting off, with the privity of the testator, of the signature of one of the witnesses, for the purpose of its being re-written, *In b. Tozer*, 7 Jur. 134. See also *In b. Coleman*, 2 Sw. & Tr. 314; 30 L. J. P. 170; 5 L. T. 119.

Tearing off seal and part of will.

But where a testator, *animo revocandi*, tears off the seal and a syllable of a word in the body of the will, *Price* v. *Powell*, 3 H. & N. 341; or the signature and attestation clause, *In b. Lewis*, 1 Sw. & Tr. 31; 27 L. J. P. 31; or the attestation clause and the names of the witnesses, *Abraham* v. *Joseph*, 5 Jur. N. S 179; or the names of the witnesses only, *Evans* v. *Dallow*, 31 L. J. P. 128; this is a complete revocation.

Will torn, and pen drawn through testator's signature.

Where a will was found with the testator's signature torn off the first four sheets, and a pen run through the signature on the fifth and last sheet, and there was evidence produced of an intention to revoke, the will was held to be revoked, *Williams* v. *Tyley*, Joh. 530. See also *In b. Simpson*, 5 Jur. N. S. 1366; *In b. Harris*, 3 Sw. & Tr. 485; 33 L. J. P. 181; 11 L. T. 276. But after due execution is proved, the burden of proving that the will has been revoked lies upon those who set up the revocation, and will not be assumed in the absence of evidence; thus a will of 1834 was found, after the testator's death in 1870, with the signature crossed out, but there being no evidence when the crossing out was done, the Court refused to presume that it was before 1838, *Benson* v. *Benson*, L. R. 2 P. & D. 172; 40 L. J. P. 1; 23 L. T. 709.

Tearing in a fit of anger.

The question whether a will was revoked by the testator's tearing it in a fit of anger into four pieces, where he afterwards desired his housekeeper to sew them together again, was raised but not decided in *In b. Colberg*, 2 Cur. 832.

As to revocation of codicils by destruction of will.

Under the old law, a codicil was *primâ facie* dependent on the will, and the destruction of the will was an implied revocation of the codicil, but the destruction of a will was not necessarily a revocation of the codicil. In some cases under the present law it appears to have been considered that the question was one of intention, and that if there was evidence of intention to revoke it, the codicil, though existent, would be revoked by the destruction of the will, see *Clogstoun* v. *Wolcott*, 5 No. Cas. 623; *Grimwood* v. *Cozens*, 2 Sw. & Tr. 364; *In b. Dutton*, 3 Sw. & Tr. 66; 32 L. J. P. 137; 8 L. T. 609; *In b. Greig*, L. R. 1 P. & D. 72; 35 L. J. P. 113; 13 L. T. 681; but it is now established that a codicil can only be revoked by one of the modes indicated in sect. 20, and is not in any case under the new law revoked simply by the destruction of the will, *Black* v. *Jobling*, L. R. 1 P. & D. 685; 38 L. J. P. 74; 21 L. T. 298; *In b. Savage*, L. R. 2 P. & D. 78; 39 L. J. P. 25; 22 L. T. 375; *In b. Turner*, L. R. 2 P. & D. 403; 27 L. T. 322; *Gardiner* v. *Courthope*, 12 P. D. 14; 56 L. J. P. 55; 57 L. T. 280. See, however, *In b. Bleckley*, 8 P. D. 169; 52 L. J. P. 102, where a testator having executed a codicil at the foot of his will, cut off his signature to the will, believing that he thereby

§ 20. the testator or by some person in his presence and by his direction (*t*) with the intention of revoking the same (*u*).

destroyed also the codicil, which, however, he left unmutilated. Sir J. Hannen held that the circumstances showed an intention to revoke both the will and the codicil, and that the latter was revoked. A codicil revoking a will does not necessarily revoke a prior codicil, *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800.

Revocation by destruction.

(*t*) The power to revoke a will in the testator's absence cannot be delegated; therefore the direction by a testator that his will shall be destroyed, either in his lifetime, *Rooke* v. *Langdon*, 2 L. T. O. S. 495; *In b. Dadds*, D. & Sw. 290; or after his death, *Stockwell* v. *Ritherdon*, 1 Rob. 661, is inoperative, the Act requiring the destruction to be in the presence and by the direction of the testator. So where a will was burnt by the direction, but not in the presence of the testator, the draft was admitted to probate, *In b. Dadds*, *ubi sup.* And where a wife destroyed her husband's will without his consent, the Court, on admitting a copy of the will to probate, ordered the costs to be paid by the widow, *Horne* v. *Horne*, Prob. Ct., Dec. 1859.

Will not forthcoming at testator's death.

(*u*) Where a will which is traced into the hands of a testator, *Patten* v. *Poulton*, 1 Sw. & Tr. 55; 27 L. J. P. 41, or that part of a will executed in duplicate which is retained by the testator in his own possession, *Saunders* v. *Saunders*, 6 No. Cas. 518, is not forthcoming at the testator's death, the presumption of law is, that it has been destroyed by him *animo revocandi*; this presumption may be rebutted by circumstances, *ib.*; see also *In b. Hains*, 5 No. Cas. 621; *Battyll* v. *Lyles*, 4 Jur. N. S. 718; *Whiteley* v. *King*, 5 N. R. 12; but will prevail until it is rebutted by satisfactory evidence, *Eckersley* v. *Platt*, L. R. 1 P. & D. 281; 36 L. J. P. 7; 15 L. T. 327; *Allan* v. *Morrison*, '00, A. C. 604; 69 L. J. P. C. 141. In *James* v. *Shrimpton*, 1 P. D. 431; 45 L. J. P. 85; 35 L. T. 428, a will, revoked by marriage, was revived by codicil, but at the testator's death the codicil could not be found; on proof of intention to adhere to the will, probate was granted of the will and the draft of the codicil. In *In b. Debac*, 77 L. T. 374, a testator made and duly executed a will and afterwards a codicil revoking certain portions of the will. The documents were kept by the testator in separate sealed envelopes. On his death the will only was found, with the seal of the envelope containing it broken. It was held that although the presumption of law must prevail as to the destruction of the codicil, probate could only be granted of such parts of the will as the codicil by its execution had not revoked. As to the admissibility of declarations made by a testator as to his intention in such cases, see *Keen* v. *Keen*, L. R. 3 P. & D. 105; 42 L. J. P. 61; 29 L. T. 247. Oral declarations made by a testatrix are inadmissible to prove the destruction by her of a duplicate of the will, or of the fact that there was such a duplicate, *Atkinson* v. *Morris*, '97, P. 40; 66 L. J. P. 17; 75 L. T. 440.

§ 20.

The cases under the old law upon wills executed in duplicate are collected in Sugd. R. P. Stat. 350, n. See also 1 Wms. Exors. 115; *Doe* v. *Strickland*, 8 C. B. 724; 19 L. J. C. P. 89. Those cases are applicable to the present law. Duplicate wills.

Where a portion of a will was found locked up in the testator's bureau, the first sheet, containing the substance of the will, being detached and missing, it was held, on the presumption of law, that the mutilation was done by the testator *animo revocandi*, *Williams* v. *Jones*, 7 No. Cas. 106. But where a will, which had been well executed, was found after the testator's death with his signature erased, and his name re-written a little below the place of the first signature, it was held that this erasure had not been made *animo revocandi*, and probate was allowed with the original signature restored, and the second signature omitted, *In b. King*, 2 Rob. 403. Part only of a will found at testator's death.

A will on six or eight sheets was signed by the testator and by witnesses; after the testator's death two only of the inner sheets were found; as the last sheet, upon which alone was the execution required by the statute, was not forthcoming, the Court presumed a revocation, *In b. Gullan*, 1 Sw. & Tr. 23; 27 L. J. P. 15; *Gullan* v. *Grove*, 26 Be. 64. Last sheet missing.

And so a codicil not found with the will and other codicils is presumed to have been revoked, *In b. Shaw*, 1 Sw. & Tr. 62.

If a will be lost or destroyed, without the intention of revoking it, and the substance thereof can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance, Taylor, Evidence, 307; *Brown* v. *Brown*, 8 E. & B. 886; 27 L. J. P. 20; *Harris* v. *Knight*, 15 P. D. 170; 62 L. T. 507. The contents of a lost will may be proved by secondary evidence; declarations of the testator, before execution, are admissible; the contents may be proved by a single witness; and when the contents are not completely proved, probate will be granted to the extent of which they are proved, *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 372; provided that the contents as proved are really substantially the testamentary intentions of the testator. Where evidence was given as to the person appointed residuary legatee, but the evidence did not show the nature and amount of the previous bequests in the will, nor the names of the legatees, and it was thus impossible to ascertain what the testator intended the residuary legatee to take, a grant of probate on such evidence was refused, *Woodward* v. *Goulstone*, 11 A. C. 469; 56 L. J. P. 1; 55 L. T. 790. The proof of a will that has been destroyed or lost is viewed by the Court with jealousy and mistrust, *Moore* v. *Whitehouse*, 3 Sw. & Tr. 567; 34 L. J. P. 31; 11 L. T. 458; the due execution of the will, and its existence after the death of the testator, should in general be proved, and a satisfactory explanation given of the circumstances attending the destruction or loss, see *Burls* v. *Burls*, L. R. 1 P. & D. 472; 36 L. J. P. 125; 16 L. T. 677. As a rule, a draft or copy Codicil not forthcoming. Probate of copy, or of substance of will.

OBLITERATIONS AND INTERLINEATIONS.

No alteration except in certain cases, in a will, shall have any effect, unless executed as a will.

XXI. And be it further enacted, That no obliteration interlineation (*x*) or other alteration made in any will after the execution thereof shall be valid or have any effect (*y*),

---

is required to be propounded before admitting it to probate, though probate of a draft *may* be obtained on motion, *In b. Barber*, L. R. 1 P. & D. 267; 36 L. J. P. 19; 15 L. T. 192. In *Mills* v. *Millward*, 15 P. D. 20; 59 L. J. P. 23; 61 L. T. 651, probate of a will as contained in an affidavit of the executor was granted, the will having been destroyed without intention of revoking it. Where the will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by an executor, but, after most of the pieces had been recovered and gummed together there were still some blanks left, though the copy showed what all the words omitted in the blanks had been, probate was granted of the incomplete will and the copy as together constituting the will of the deceased, *In b. Leigh*, '92, P. 82; 61 L. J. P. 124; 66 L. T. 379. See also *Gill* v. *Gill*, '09, P. 157; 78 L. J. P. 60; 100 L. T. 861.

(*x*) As to the interlineations, see *In b. White*, 6 Jur. N. S. 808; *In b. Birt*, L. R. 2 P. & D. 214; 40 L. J. P. 26; 24 L. T. 142.

Alterations presumed to be made after execution.

(*y*) Alterations appearing on the face of a will are, in the absence of satisfactory evidence, intrinsic or extrinsic, to the contrary, presumed to have been made after the execution, and are therefore held not to form part of the will, *Burgoyne* v. *Showler*, 1 Rob. 5; *Cooper* v. *Bockett*, 4 Moo. P. C. 419; 59 R. R. 371; *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57; and see *Gann* v *Gregory*, 3 D. M. & G. 777; 98 R. R. 308; *Simmons* v. *Rudall*, 1 Sim. N. S. 115; 89 R. R. 44; *Doe* v. *Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 367; *Keigwin* v. *Keigwin*, 3 Cur. 607; *Williams* v. *Ashton*, 1 J. & H. 115; *In b. Hindmarch*, L. R. 1 P. & D. 307; 36 L. J. P. 24; 15 L. T. 391; see also *In b. Cadge*, L. R. 1 P. & D. 543; 37 L. J. P. 15; 17 L. T. 484, where a distinction was taken between interlineations and alterations.

Interpolated sheets.

In *In b. Countess of Morton*, 13 Jur. 1108, a sheet substituted for an original sheet of the will was assumed to have been substituted before execution. But in *Treloar* v. *Lean*, 14 P. D. 49; 58 L. J. P. 30; 60 L. T. 512, the evidence showed that those sheets which had been substituted by the testator for original sheets had been substituted after execution, and probate of the will was refused. The legal presumption is that papers bound together, and constituting the will as found at the testator's death, were so bound together at the time of execution, *Rees* v. *Rees*, L. R. 3 P. & D. 84; 29 L. T. 375.

Parol declarations of testator.

Where several undated interlineations appeared in a will, upon evidence of the parol declarations of the testator made before the date

§ 21.

of the will, one of those interlineations was admitted to probate, *In b. Foley*, 25 L. T. O. S. 311. Verbal and written statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will, *Johnson* v. *Lyford*, L. R. 1 P. & D. 546; 37 L. J. P. 65; 18 L. T. 769. Parol declarations made before the date of the will are admissible, *Doe* v. *Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 369; *Dench* v. *Dench*, 2 P. D. 60; 46 L. J. P. 13. It is doubtful whether parol declarations after execution are admissible; see *Woodward* v. *Goulstone*, 11 A. C. 469; 56 L. J. P. 1; 55 L. T. 790; see also *In b. Ripley*, 1 Sw. & Tr. 68; *Staines* v. *Stewart*, 2 Sw. & Tr. 320; 31 L. J. P. 10; 5 L. T. 457; *In b. Weston*, L. R. 1 P. & D. 633; 38 L. J. P. 53; 20 L. T. 330. They are probably inadmissible, *Atkinson* v. *Morris*, '97, P. 40; 66 L. J. P. 17; 75 L. T. 440. As to declarations made after the date of the will, but before the execution of a codicil confirming the will, see *In b. Sykes*, L. R. 3 P. & D. 26; 42 L. J. P. 17; 28 L. T. 142. And see *Keen* v. *Keen*, L. R. 3 P. & D. 105; 42 L. J. P. 61; 29 L. T. 247, as to declarations of intention to adhere or not to adhere to a will. Compare Ste. Evid., art. 29.

Blanks filled up in black and red ink.

Blanks in a will were filled up by the testator, as to part in black, and as to the rest in red ink; upon the circumstances of the case the former were held to have been filled in before, the latter after execution, *Birch* v. *Birch*, 1 Rob. 675.

Parts of will in different ink or handwriting.

The mere circumstance of the amount of a legacy or the name of a legatee being inserted in different ink, and in a different handwriting, does not alone constitute an "obliteration, interlineation, or other alteration," within the meaning of the statute, nor does any presumption arise therefrom against a will having been duly executed in the form in which it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been "superinduced by other writing." In such circumstances the *onus* lies upon the person who alleges such alteration to have been made prior to execution to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator, *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57.

Affidavits of witnesses.

Where alterations, obliterations, and erasures appear on the face of a will, all the witnesses must join in the affidavit produced on the demand of probate; or the absence of a witness should be explained and accounted for, *In b. Townsend*, 5 No. Cas. 146.

Probate in *fac simile*.

In *Gann* v. *Gregory*, 3 D. M. & G. 777; 98 R. R. 308; *Shea* v. *Boschetti*, 18 Be. 321; *In b. Kendall*, 4 No. Cas. 317; *In b. Smith*, 3 Sw. & Tr. 589; 34 L. J. P. 19; 11 L. T. 684, probate was granted in *fac simile*, thus leaving it to a court of construction to decide as to the effect of the alterations and interlineations. In *Gann* v. *Gregory*, Lord Cranworth, C., held that the will was to be read as if the parts through which ink lines had been run formed no part of the will.

§ 21. except so far as the words or effect of the will before such alteration shall not be apparent (*z*); unless such alteration

---

Production, in court, of original will.

In construing a will, a court of construction will look at the original will and not merely at the probate copy, *Compton* v. *Bloxham*, 2 Coll. 201; 70 R. R. 178; *Manning* v. *Purcell*, 7 D. M. & G. 55; *Re Harrison*, 30 Ch. D. 390; 55 L. J. Ch. 799; 53 L. T. 799.

Unattested erasures.

(*z*) The obliteration of a bequest, with the addition of the unattested words "erased by me, M. L.," written by the testator, is not a revocation if the original words are "apparent" on the face of the will; and to

Evidence of experts.

ascertain this fact the evidence of engravers and other experts and the use of magnifying glasses are admissible, *Cooper* v. *Bockett*, 4 Moo. P. C. 419; 59 R. R. 371; *In b. Oppenheim*, 17 Jur. 306; *In b. Ibbetson*, 2 Cur. 337; *In b. Beavan*, 2 Cur. 369; *Finch* v. *Combe*, '94, P. 191; 63 L. J. P. 113; 70 L. T. 695; 4 R. P. Com. Rep. 31. As to the removal of pieces of paper gummed over portions of the will, see *In b. Horsford*, L. R. 3 P. & D. 211; 62 L. J. P. 111; 68 L. T. 451; *In b. Gilbert*, '93, P. 183; 44 L. J. P. 9; 31 L. T. 553; *Finch* v. *Combe*, '94, P. 191; 63 L. J. P. 113; 70 L. T. 695. As to the evidence of experts, see *In b. Rushout*, 13 Jur. 458; *In b. Abbey*, 5 No. Cas. 615.

Obliteration with unattested substitution.

Where a testator, by means of an erasure made with a knife, intended to revoke a legacy, and then by writing over the erasure to substitute a sum different from that originally given, such subsituted legacy, if unsigned and unattested, is not effectually given, and the original legacy is not revoked, although its amount is no longer "apparent," and parol evidence is admissible to show what the original legacy was, *Brooke* v. *Kent*, 3 Moo. P. C. 334; 50 R. R. 59; see also *In b. Reeve*, 13 Jur. 370; *Soar* v. *Dolman*, 3 Cur. 121; *In b. Nelson*, Ir. R. 6 Eq. 569; *Jeffery* v. *Cancer Hospital*, 57 L. T. 600; and probate will be granted of the will in its original state. This is in accordance with the authorities referred to, *ante*, p. 43, as to dependent relative revocation. So also in the case of an unattested obliteration of an executor's name and substitution of another name, *In b. Parr*, 6 Jur. N. S. 56; *In b. Harris*, 1 Sw. & Tr. 536; *In b. Greenwood*, '92, P. 7; 61 L. J. P. 56; 66 L. T. 61. But if the erased words are not apparent and proof cannot be given as to the original words, probate will be granted in blank as to the erased parts, *In b. James*, 1 Sw. & Tr. 238; *In b. Livock*, 1 Cur. 906; *In b. Ibbetson*, 2 Cur. 337; *Doherty* v. *Dwyer*, 25 L. R. Ir. 297; *In b. Nelson*, I. R. 6 Eq. 569.

"Apparent," meaning of.

The word "apparent" means "apparent on an inspection of the document itself," 1 Wms. Exors. 107; *Townley* v. *Watson*, 3 Cur. 761.

Obliteration without substitution.

Where the words forming the gift of a legacy, *Townley* v. *Watson*, *sup.*, are *animo revocandi*, and without any intention of substituting another gift, so obliterated by the testator with pen and ink as to be illegible, this is a complete revocation of the legacy, and parol evidence will be inadmissible to restore the will. But the principle of dependent relative

shall be executed in like manner as hereinbefore is required for the execution of the will (*a*); but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses (*b*) be made in the margin or on some other part

§ 21.

---

With substitution.

revocation applies to a case where the testator has erased the name of a legatee so that it is no longer apparent, and has substituted another name for it; and if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee, the Court will receive evidence to show what the original name was, *In b. M'Cabe*, L. R. 3 P. & D. 94; 42 L. J. P. 79; 29 L. T. 250. See also *In b. Horsford*, L. R. 3 P. & D. 211; 62 L. J. P. 111; 68 L. T. 461; *Finch* v. *Combe*, '94, P. 191; 63 L. J. P. 113; 70 L. T. 695, in both which cases the testator had pasted paper over certain parts of his will; and see *Sturton* v. *Whetlock*, 52 L. J. P. 29; 48 L. T. 237; *In b. Nelson*, I. R. 6 Eq. 569.

Interlineations, &c., subsequent codicil.

(*a*) The presumption that alterations and obliterations were made after the execution holds even where a codicil has been well executed, *Lushington* v. *Onslow*, 6 No. Cas. 183; *Rowley* v. *Merlin*, 6 Jur. N. S. 1165; *In b. Bradley*, 5 No. Cas. 95; *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; 32 L. J. P. 73; 7 L. T. 801. To rebut this presumption, alterations and obliterations in a will must be referred to and identified in the subsequent well-executed codicil, or be proved to have existed before the date of the codicil, *In b. Mills*, 11 Jur. 1070; *In b. Mogg*, 1 No. Cas. 325; *In b. Wyatt*, 2 Sw. & Tr. 494; 31 L. J. P. 197; 6 L. T. 694; *In b. Bradley*, 5 No. Cas. 95; *Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; 60 L. J. P. 86; 63 L. T. 779; *In b. Heath*, '92, P. 253; 61 L. J. P. 131; 67 L. T. 356; *Oldroyd* v. *Harvey*, '07, P. 326; 76 L. J. P. 161; 98 L. T. 56. Nor are unattested additions to a will made part of the testamentary instrument by a subsequently well-executed codicil beginning, "By this codicil to my will," *Haynes* v. *Hill*, 1 Rob. 795; but see *In b. Tegg*, 4 No. Cas. 531; *Neate* v. *Pickard*, 2 No. Cas. 407. As to the effect of a codicil upon unsigned and unattested cancellations in a prior will, see *In re Hay*, '04, 1 Ch. 317; 73 L. J. Ch. 33.

Alterations attested by signatures of testator and witnesses.

(*b*) The names, *In b. Wingrove*, 15 Jur. 91; or the initials, *In b. Hinds*, 16 Jur. 1161; *In b. Blewitt*, 5 P. D. 116; 49 L. J. P. 31; 42 L. T. 329, of the testator and witnesses placed in the margin of the will near the alteration are sufficient to make the alteration part of the will, without any memorandum of attestation referring to the alteration.

If alterations are made in a will after execution, the mere writing by the witnesses of their names opposite to the alterations at the request of the testator will have no effect, *In b. Cunningham*, 4 Sw. & Tr. 194; 29 L. J. P. 71; but if a testator having made alterations in a will produces the will to the witnesses and acknowledges his signature

§ 21. of the will opposite or near to such alteration (*c*), or at the foot or end of or opposite to a memorandum referring to (*d*) such alteration and written at the end or some other part of the will (*e*).

REVIVAL OF REVOKED WILL.

No revoked will to be revived otherwise than by re-execution or a codicil.

XXII. And be it further enacted, That no will or codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown (*f*).

---

thereto, and they then sign their names to the will *animo testandi*, and not merely to the alterations, this will amount to a new execution of the will, and the alterations previously made will then be validated, *In b. Dewell*, 17 Jur. 1130.

(*c*) See *In b. Wilkinson*, 6 P. D. 100, where there were alterations in the same sentence, which commenced on the second and were continued on the third side of a sheet of paper.

(*d*) See *In b. Treeby*, L. R. 3 P. & D. 242; 44 L. J. P. 44, as to what is sufficient reference.

Affidavits.

(*e*) As to the necessity for affidavits of execution in the case of the testator and witnesses writing their names or initials in the margin or near to the alterations, or in the case of a memorandum referring to the alterations, see 15 Jur. 91 (n.).

Implied revival of will abolished.

(*f*) As in the preceding sections the object of the legislature appears to have been to put an end to implied revocations of testamentary papers, so by the 22nd section the aim is to do away with implied revivals. It would seem that the "intention to revive" a revoked will by a codicil, which is required by this section, can be shown only by the contents of the codicil itself, and that no act *dehors* the codicil can be resorted to for the purpose of establishing the intention, *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J. P. 77. In that case, twenty-seven wills and codicils were found after the testator's death, besides a large number of incomplete testamentary papers; a codicil of 1858 was tied by a piece of tape to a will of 1851, which will had been revoked by another will of 1856. It was held that this merely physical annexation of the codicil was no ground

§ 22.

for inferring the intention to revive required by sect. 22, and probate was granted of the will of 1856 and the codicil of 1858.

Destruction of revoking instrument.

A duly-executed will, if once revoked by a subsequent will containing a clause of revocation, is not revived by the destruction of such subsequent will, *Major* v. *Williams*, 3 Cur. 432; *Stride* v. *Sandford*, 17 Jur. 263; and parol evidence of an intention to revive the will is inadmissible (*ib.*). In *In b. Hodgkinson*, '93, P. 339; 62 L. J. P. 116; 69 L. T. 540, a testator by his will gave all his property to I. S., and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister E. and appointing her sole executrix; but he did not revoke the first will. He subsequently destroyed the second will. *Held*, that the first will was partially revoked by the second, and that the revoked part of the first will was not revived by the revocation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy. But if a testator destroys a will solely with a view to revive a former will, then, in accordance with the doctrine of dependant relative revocation, such destruction will not operate as a revocation, *Powell* v. *Powell*, L. R. 1 P. & D. 209; 35 L. J. P. 100; 14 L. T. 800; *Cossey* v. *Cossey*, 69 L. J. P. 17; 82 L. T. 203.

Extrinsic evidence.

Extrinsic evidence was admitted to show with what object a testator had republished a will which, as to one bequest, he had varied by a codicil dated prior to such republication, *Upfill* v. *Marshall*, 7 Jur. 819; *Wade* v. *Nazer*, 1 Rob. 632. In the latter case, the re-execution of the will alone was held not to revoke a codicil to that will.

Loss of revoking instrument.

A testator duly executed his will, and afterwards executed another will which was not found at his death; of the contents of the second nothing was known, except that it was headed "last will and testament;" it was held in the Prerogative Court that the former will (which was found at the testator's death) was revoked by the latter, that the former was not revived by the second will not being forthcoming, and that there was an intestacy, but this decision was reversed by the Privy Council, *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; 105 R. R. 31; *Hellier* v. *Hellier*, 9 P. D. 237; 53 L. J. P. 105. But if, under similar circumstances, it can be proved, by strong and conclusive evidence, that the second will revoked the first, there is an intestacy, *In b. Brown*, 1 Sw. & Tr. 32; 27 L. J. P. 20; *Brown* v. *Brown*, 8 E. & B. 886; 27 L. J. Q. B. 173; *Wood* v. *Wood*, L. R. 1 P. & D. 309; 36 L. J. P. 34; 15 L. T. 593.

Legacy, substitution by codicil, and revocation of codicil.

Where a sum of 100*l.* was given by will to a legatee, afterwards in substitution a sum of 500*l.* was given by a codicil to the same legatee, and then the latter gift was revoked, the legatee was not entitled to the 100*l.*, *Boulcott* v. *Boulcott*, 2 Drew. 25; 100 R. R. 13.

Revival of will.

A testator in 1837 executed his will in duplicate, one part being kept by himself, the other by his solicitor; on the execution in 1838 by the testator of a second will, revoking in terms the prior one, the part of the

REVOCATION—SUBSEQUENT CONVEYANCE.

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*g*).

---

prior will in the possession of the solicitor was destroyed by the testator, but the part in the testator's possession remained untouched down to the time of his death; in 1839 the testator made a codicil, which referred to the will of 1837 by its date; that will was held to be revived, and parol evidence was not admitted to prove a mistake in the date, *Payne* v. *Trappes*, 1 Rob. 583. See also *In b. Chapman*, 1 Rob. 1; *In b. Goodenough*, 2 Sw. & Tr. 141; *In b. Lewis*, 7 Jur. N. S. 220; *In b. Wyatt*, 2 Sw. & Tr. 494; 31 L. J. P. 197; 6 L. T. 694; *In b. Chilcott*, '97, P. 223; 66 L. J. P. 108; 77 L. T. 372. See also *In b. Reade*, '02, P. 75; 71 L. J. P. 45; 86 L. T. 258. A will which has been revoked, in order that it may be revived by a subsequent codicil, must be in existence at the date of the reviving codicil, and must be clearly identified, *Newton* v. *Newton*, 12 Ir. Ch. Rep. 118. If there is any doubt or ambiguity with respect to the document referred to by the testator, extrinsic evidence will be admissible, *Thomson* v. *Hempenstall*, 7 No. Cas. 141; *Quincey* v. *Quincey*, 11 Jur. 111. And the execution by a testator, after his marriage, of a codicil referring to "my last will" (there being only one will in existence), was held to revive a will made before the testator's marriage, *Neate* v. *Pickard*, 2 No. Cas. 407. And see *In b. Terrible*, 1 Sw. & Tr. 140.

Two codicils only admitted to probate.

Under the circumstances detailed in *Hale* v. *Tokelove*, 2 Rob. 319, there were admitted to probate two codicils only; one executed will and the draft of another will, referred to in one of the codicils, being rejected; and *In b. Dendy*, 15 Jur. 1042, a will and the first and fourth codicils only were admitted to probate.

See also *In b. Harper*, 7 No. Cas. 44, the marginal note to which requires correction; and the notes to sect. 20, *ante*, pp. 40 *et seq.*

Revocation by alteration of estate abolished.

(*g*) Revocation by alteration of estate is abolished, *Ford* v. *De Pontès*, and *De Pontès* v. *Kendall*, 31 L. J. Ch. 185; 5 L. T. 515. The acquisition of a larger estate, *Saxton* v. *Saxton*, 13 Ch. D. 359; 49 L. J. Ch. 128; 41 L. T. 648; or a larger interest, *Russell* v. *Chell*, 19 Ch. D. 432; 51 L. J. Ch. 401; 46 L. T. 336, does not affect the validity of a testamentary disposition, which takes effect upon the estate or interest as existing at the testator's death. Compare the note to sect. 24, *post*.

§ 23.

In Shelford's Real Property Statutes the scope of this section is thus defined: "This clause of the Act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower, but it does not apply to cases where the thing meant to be given is gone."

Scope of this section.

Under this section it has been held that where a testator subsequently to his will contracted for the sale of an estate which he had specifically devised, and the contract remained uncompleted at his decease, the purchase-money belonged to his personal representatives as part of his personal estate, and not to the devisees of the property, the testator having, at the time of his death, merely a claim for the purchase-money, with a lien on the estate for its payment, which lien, it was considered, was not such an interest as was in the contemplation of the legislature in the concluding part of this section, *Farrar* v. *Earl of Winterton*, 5 Be. 1; 59 R. R. 392. And the result is not varied by the fact that the purchaser had deposited the title deeds of the said property with the vendor, as security for part of the purchase-money; the clause applies to cases where testators, having devised their estates, make conveyances of them, merely modifying the ownership, and not to cases where the thing to be given is gone, *Moor* v. *Raisbeck*, 12 Sim. 123; 56 R. R. 31. In *Re Clowes*, '93, 1 Ch. 214; 68 L. T. 395, a testator being absolutely entitled to a freehold estate specifically devised it to H. Afterwards he sold the estate to a purchaser, and on the following day the property was reconveyed to him by way of mortgage for securing part of the purchase-money which was allowed to remain charged on the estate. *Held*, that the sum secured by the mortgage did not pass to the specific devisee. Nor is the result varied by the fact that the sale was compulsory under the powers of a private Improvement Act, *Ex parte Hawkins*, 13 Sm. 569; or a Railway Act, *Re The Manchester and Southport Railway Company*, 19 Be. 365. See also *Haynes* v. *Haynes*, 1 Dr. & S. 426; Sugd. R. P. Stat. 360. But the devisee is entitled to the rents which accrue between the testator's death and the completion of the purchase, *Watts* v. *Watts*, L. R. 17 Eq. 217.

As to unpaid purchase-money of real estate specifically devised.

And where the title deeds were deposited as security for unpaid purchase-money.

Compulsory sale.

It is not infrequent to find, in leases of freehold property, a clause which gives the lessee an option to purchase the demised property, either pending the term, or within a shorter fixed period. If the lessee exercises his option during the life of the lessor, of course the purchase-money goes, on the death of the lessor, testate or intestate, to his personal representatives. And if the option is exercised after the death of the lessor, and the lessor dies intestate, or has only generally devised his real estate, the purchase-money still goes to the personal representatives of the lessor, and not to his heir or devisee, *Lawes* v. *Bennett*, 1 Cox, 167; 1 R. R. 10; *Townley* v. *Bedwell*, 14 Ves. 591; 9 R. R. 352; *Weeding* v. *Weeding*, 1 J. & H. 424. See also *Collingwood* v. *Row*, 5 W. R. 484;

Option to purchase after testator's death.

*Goold* v. *Teague*, 7 W. R. 84; *Knollys* v. *Shepherd*, cited 1 J. & W. 499; *Wright* v. *Rose*, 2 S. & S. 323; 25 R. R. 209; *Re Isaacs*, '94, 3 Ch. 506; 63 L. J. Ch. 815; 71 L. T. 386. But if the lessor, by will made after the contract giving the option to purchase, specifically devises the property without referring to the contract, then the purchase-money will go to the devisee, *Drant* v. *Vause*, 1 Y. & C. 1; *Emuss* v. *Smith*, 2 De G. & S. 722; 79 R. R. 346; *Re Pyle*, '95, 1 Ch. 724; 64 L. J. Ch. 477; 72 L. T. 327 (in which last-mentioned case the will was made on the same day as the lease giving the option of purchase was executed).

But, in the case above considered, the rents accruing due in the interval between the lessor's death and the exercise by the lessee of his option to purchase belong to the heir or devisee, *Townley* v. *Bedwell*, 14 Ves. 591; 9 R. R. 352. See also *Shadforth* v. *Temple*, 10 Sim. 184; *Lumsden* v. *Fraser*, 12 Sim. 263; *Ex parte Walker*, 1 Drew. 508; *Ex parte Hardy*, 30 Be. 206.

Where real estate was devised to A., with an option to B. to purchase the same for 10,000*l.*, and the option was exercised, legacy duty was held payable on the 10,000*l.*, *Attorney-General* v. *Wyndham*, 1 H. & C. 563; compare Jarm. Wills, 54; and see also as to options to purchase or rights of pre-emption, *Pegg* v. *Wisden*, 16 Be. 239; *Brooke* v. *Garrod*, 2 De G. & J. 62; *Re Cant's Estate*, 4 De G. & J. 503; *Woods* v. *Hyde*, 10 W. R. 339; *Evans* v. *Stratford*, 2 H. & M. 142; *Lord Ranelagh* v. *Melton*, 2 Dr. & S. 278; *Weston* v. *Collins*, 5 N. R. 345; *Moss* v. *Barton*, 35 Be. 197; *Buckland* v. *Papillon*, *ib.* 281; *Hale* v. *Bushill*, *ib.* 343; *Highgate Archway Company* v. *Jeakes*, L. R. 12 Eq. 9; 40 L. J. Ch. 408; 24 L. T. 567; *Ward* v. *Wolverhampton Waterworks Company*, L. R. 13 Eq. 243; 41 L. J. Ch. 308; 25 L. T. 487.

*Gale* v. *Gale*.

Real estate was conveyed to trustees upon trust for A. for life, with remainder for such persons as A. should by deed or will appoint, and, in default, for the children of five persons named. The trustees were empowered, with the consent of A., to sell the settled property, and invest the proceeds in other real estate to be settled to the same uses. A., in exercise of his power, by will dated in 1846, appointed the settled estate to trustees upon trust to sell and to pay the proceeds to the children of B., and he devised all other his real estate, not thereinbefore specifically disposed of, to his wife. In 1849 the trustees of the settlement, with A.'s consent, sold the settled estate; but on the death of A., which took place in 1850, the purchaser's conveyance was not executed by one of the trustees, and the purchase-money was unpaid. It was held that there was an ademption, that the appointment by the will of A. had no effect, either on the new estate to be purchased with the produce of the settled estate or on the purchase-money which stood in its place; and that the widow and residuary legatee of A. was entitled to the purchase-money of the settled estate, *Gale* v. *Gale*, 21 Be. 349. This decision has been criticised, but was followed in *Blake* v. *Blake*, 15 Ch. D. 481; 49 L. J. Ch. 393; 42 L. T. 724. See *In re Dowsett*, '01, 1 Ch.

WILL SPEAKS, FROM WHAT PERIOD.

XXIV. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*h*).

A will shall be construed to speak, as to the estate comprised, from the death of the testator.

398; 70 L. J. Ch. 149; and *In re Moses*, '02, 1 Ch. 100; 71 L. J. Ch. 101; 85 L. T. 596.

A bequest of railway shares generally includes railway stocks, *Morrice* v. *Aylmer*, L. R. 7 H. L. 717; 45 L. J. Ch. 614; 34 L. T. 218, overruling *Oakes* v. *Oakes*, 9 Ha. 666; 89 R. R. 613. See also *Re Pilkington's Trusts*, 6 N. R. 246. But debentures converted into debenture stock did not pass under a gift of "all my debentures," *Luard* v. *Lane*, 14 Ch. D. 856; 49 L. J. Ch. 768; 43 L. T. 87. Debenture stock passed under a bequest of "shares," the testatrix having no shares, in *In re Weeding*, '96, 2 Ch. 364; 65 L. J. Ch. 743; 74 L. T. 651. See also *In re Herring*, '08, 2 Ch. 493; 77 L. J. Ch. 665; 99 L. T. 144.

Railway shares converted into stock.

(*h*) This section makes a will speak, with reference to the property comprised in it, *i.e.* with reference to any gift contained in the will, *Gibson* v. *Gibson*, 1 Drew. 61, 62; including property appointed, *Freme* v. *Clement*, 18 Ch. D. 499, 509; 44 L. T. 399; and only as to the property comprised in it, as from the death of the testator; it does not extend to the testator's capacity, so as to render valid a will executed during minority of a testator who died after attaining majority (see note to sect. 7); or so as to make good the will, executed before the Married Women's Property Act, 1893, during coverture, of a testatrix who dies a widow, effective to pass property acquired by her after coverture, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345; 32 L. T. 410; *In re Price*, 28 Ch. Div. 709; 54 L. J. Ch. 509; 52 L. T. 430; nor does sect. 24 extend to the objects of the testator's bounty, *In re Whorwood*, 34 Ch. Div. 446; 56 L. J. Ch. 340; 56 L. T. 71. Where a sum of money was bequeathed to trustees, upon trust for A. for life or until her marriage, and A., who was a widow at the date of the will, married again in the testator's lifetime, and the testator died without re-executing his will, it was held that A. was not entitled to any interest under the will, *Bullock* v. *Bennett*, 7 D. M. & G. 283. In *Lloyd* v. *Davies*, 15 C. B. 76; 18 Jur. 1056; 100 R. R. 241, a devise to three daughters as tenants in common was to be varied on the marriage of any one of them; it was held that the marriage contemplated was a marriage in the testator's lifetime, or at all events within twelve months after his death; and that, in the event of no marriage taking place within that time, the proposed variation would not take effect. It would seem, also, that sect. 24 is not applicable to the construction of a clause excepting property from the operation of

Will speaks from death, as to property only.

§ 24.

the will, see *Hughes* v. *Jones*, 1 H. & M. 765. See also *Amyot* v. *Dwarris*, '04, A. C. 268; 73 L. J. P. C. 40; 90 L. T. 102.

Contrary intention.

But, so far as the property comprised in or which passes by the will is concerned, to exclude the application of this section, the "contrary intention" must appear on the will, and must have a continuing operation down to the death of the testator. The will must be taken as if executed immediately before the death, and when so taken must show a "contrary intention," *Thomas* v. *Jones*, 1 D. J. & S. 63, 83. See also *In re Gillins*, '09, 1 Ch. 345; 78 L. J. Ch. 244; 100 L. T. 226.

Estate of which "I am now seised."

But a devise of all the real estate of which "I am now seised," notwithstanding this section, has been held to pass only the real estates belonging to the testator at the date of his will, and not any subsequently acquired estates, *Cole* v. *Scott*, 1 M'N. & G. 518; 84 R. R. 141; *Hutchinson* v. *Barrow*, 6 H. & N. 583; 9 W. R. 538; *Williams* v. *Owen*, 2 N. R. 585; *Cave* v. *Harris*, 57 L. J. Ch. 62; 57 L. T. 768. But see *Hepburn* v. *Skirving*, 4 Jur. N. S. 651.

"All my Quendon Hall estates."

A devise of "all my Quendon Hall estates in Essex" in a will of 1844 was held not to pass small additions to what were clearly comprised in the devise, which additions were acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that date, *Webb* v. *Byng*, 1 K. & J. 580; 103 R. R. 249. But the term "Quendon Hall estates" was not a recognised appellation of any particular property, and extrinsic evidence was admitted to show what the testatrix understood to be comprised in that arbitrary designation. But see *Re Otley and Ilkley Railway*, 34 Be. 525; *Wagstaffe* v. *Wagstaffe*, L. R. 8 Eq. 229; 38 L. J. Ch. 528; *Castle* v. *Fox*, L. R. 11 Eq. 542; 40 L. J. Ch. 302; 24 L. T. 536 (disapproving *Cole* v. *Scott*); *In re Portal and Lamb*, 30 Ch. D. 50; 54 L. J. Ch. 1012; 53 L. T. 650; Dart, V. & P. 308.

Estate of which "I am seised."

By a will dated in 1835, the testator devised "all the freehold lands and hereditaments of or to which I or any person in trust for me am, is, or are seised;" by a codicil of 1845 the testator devised all the lands comprised in and devised by his said will to uses; real estate acquired by the testator after the date of the codicil was held to pass by the will and codicil, *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391; 26 L. J. Ch. 27; 107 R. R. 76; see also *Doe* v. *Walker*, 12 M. & W. 591; *Lord Lilford* v. *Powys-Keck*, 33 Be. 300; *Jepson* v. *Key*, 2 H. & C. 873; 10 L. T. 68.

In *Re Champion*, '93, 1 Ch. 101; 62 L. J. Ch. 372; 67 L. T. 694, a testator by his will made in April, 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation," to trustees upon certain trusts. In September, 1873, the testator purchased two fields adjoining the cottage and occupied them with the cottage until his death. In 1877 he made a codicil by which he confirmed his will. It was held that the two fields purchased in September, 1873, passed under the devise. The republication of the will by the codicil left no room for doubt, but North, J., held that the after-acquired fields

§ 24.

would have passed by the will if there had been no republication by the codicil.

As to republication of a will by a codicil, see also *Barnes* v. *Crowe*, 1 Ves. 486; 2 R. R. 154; *In re Smith*, 45 Ch. D. 632; 60 L. J. Ch. 57; 63 L. T. 448.

"My estate and effects."

In *O'Toole* v. *Browne*, 3 E. & B. 572; 97 R. R. 660, a residuary gift to executors, upon trust to sell and invest the proceeds on security, in which the words "my estate and effects" were used in connection with words applicable to personalty, was held to pass after-acquired real estate; and a like decision was given under similar circumstances in *Stokes* v. *Salomons*, 15 Jur. 483; see also *Dobson* v. *Bowness*, L. R. 5 Eq. 404; 37 L. J. Ch. 309.

Leaseholds.

After-acquired leaseholds pass under a bequest of "all my leasehold tenements," and not under the residuary bequest, *Lady Langdale* v. *Briggs*, *supra*; *Dickinson* v. *Dickinson*, 12 Ch. D. 22; 41 L. T. 13.

"My new 3¼ per cent. annuities."

A gift of "my new three and a quarter per cent. annuities" was held to comprise all the new three and a quarter per cent. annuities which the testator had at his death, *Goodlad* v. *Burnett*, 1 K. & J. 341; 103 R. R. 113. In that case V.-C. Wood illustrated this section thus: "If I refer to a particular thing, *e.g.* a ring, or a horse, and bequeath it as 'my ring,' or 'my horse,' it would seem that the contrary intention, to which the 24th section refers, 'appears by the will,' and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" See also *Douglas* v. *Douglas*, Kay, 400; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; *Re Gibson*, L. R. 2 Eq. 669; 35 L. J. Ch. 596; *In re Slater*, '07, 1 Ch. 665; 76 L. J. Ch. 472; 97 L. T. 74; *In re Jameson*, '08, 2 Ch. 111; 77 L. J. Ch. 729; 98 L. T. 745; *In re Evans*, '09, 1 Ch. 784; 78 L. J. Ch. 441; 100 L. T. 779. And a gift of all the moneys "I possess in the A. bank, or in the company's funds," will pass all the moneys answering those descriptions at the death of the testator, *Hepburn* v. *Skirving*, 4 Jur. N. S. 651.

"All the moneys I possess in the A. bank."

All the interest in mortgaged property.

A gift of all the interest and claim of the testator on household property at P., of which the testator was mortgagee, will pass arrears of interest owing at the testator's death as well as the principal, *Gibbon* v. *Gibbon*, 13 C. B. 205; 17 Jur. 416; 93 R. R. 498.

Exoneration from claims for money charged on estates in Scotland.

Exoneration "from all claims in respect of moneys laid out by me in improvements of the estates in Scotland, and which money has according to the laws of Scotland been charged thereon," was held to apply only to moneys charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged, *Douglas* v. *Douglas*, Kay, 400; 23 L. J. Ch. 732; 101 R. R. 677. But a release of debts in general terms is a gift of personal estate to which the section applies, *Everett* v. *Everett*, 7 Ch. D. 428;

§ 24.

47 L. J. Ch. 367; 38 L. T. 580, with which compare *Sidney* v. *Sidney*, L. R. 17 Eq. 65; 43 L. J. Ch. 15.

Will exercising power.

In each of the cases, *Price* v. *Parker*, 16 Sim. 198; 80 R. R. 53, and *Trimmell* v. *Fell*, 16 Be. 539, the will of a married woman, which was invalid on its execution, from not being within the terms of the power under which the will purported to be made, was not construed as if executed immediately before the testatrix's death, at which period the execution would have been valid. So, where a fund was limited in trust for such of the children of a marriage as the husband and wife should jointly appoint, and, in default of joint appointment, then as the survivor at any time or times "after the decease of the other" should by deed or will appoint, the power was not exercised by the will of the husband made in the lifetime of the wife, though he in the event was the survivor, *Cave* v. *Cave*, 8 D. M. & G. 131; *In re Blackburn*, 43 Ch. D. 75; 59 L. J. Ch. 208.

General power over equitable estate, given to the survivor of two persons.

But if the time for the exercise of the power be not expressly defined, it would seem that a general power of appointment over an equitable estate, given to the survivor of two persons, to be executed by deed or will, would be executed by a will made during the lives of both the persons by the one who in the event proved to be the survivor, Sugd. R. P. Stat. 379. But in *Re Moir's Trusts*, 46 L. T. 723, Bacon, V.-C., held that a special power, given to the survivor of two persons, was not exercisable by will of the actual survivor made during the lifetime of the other, although the power was not expressly declared to be exercisable by the survivor only "after the decease of the other," as in *Cave* v. *Cave*.

The application of sect. 34 to wills exercising special power of appointment was considered in *Re Wells' Trusts*, 42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588. Such a general power, which may be used for the benefit of the person entitled to exercise it, is equivalent to ownership, and is in fact a right of exercising ownership which will certainly belong to one of two persons, though it is for the moment uncertain in which of those two it will actually become vested. A power to the survivor of two persons to declare a trust for his own benefit is not to be distinguished in principle from a trust for the benefit of the survivor; the one is a contingent trust, the other a contingent power; and as in equity a contingent interest is alienable by will, it would seem there is nothing to prevent a person who has a contingent right to appoint an estate for his own benefit from exercising that power subject to the contingency, or to prevent the instrument so executed from becoming a valid execution of the power so soon as the contingency happens. It is not necessary that the authority should exist at the time of execution of the will if it be afterwards acquired and be subsisting at the death of the testator; in such case the will is entitled to the benefit of the more liberal rule of interpretation provided by the 24th section of the Act. It must be borne in mind that this applies

§ 24.

only to general powers affecting equitable estates. Thus, where a general equitable power of appointment over real estate was given to the survivor of A. and B., and A., who was a married woman, but under her marriage settlement possessed testamentary capacity, made her will in 1838 in the lifetime of B., and B. afterwards died in the lifetime of A., who did not re-execute her will, it was held that a general devise of real estate contained in the will of A. was (by sect. 24) to be taken as if it had been executed immediately before the death of A., and was (by sect. 27) a good execution of the power given to the survivor of A. and B., *Thomas* v. *Jones*, 1 D. J. & S. 63. Compare the notes to sect. 8, and to sect. 27.

Leaseholds.

A specific gift of leaseholds for all the residue of the term therein of the testator was held to pass the fee which was acquired by the testator between the date of his will and the day of his death, *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; 35 L. J. Ch. 315; 13 L. T. 697; *Cox* v. *Bennett*, L. R. 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359; 49 L. J. Ch. 128; 41 L. T. 648. But if the intention to be gathered from the will, taken as a whole, is clearly to deal only with leaseholds, then subsequently acquired real estate will not pass, *Pierce* v. *Attorney-General*, *Pierce* v. *Harrison*, 3 W. R. 612; and a devise to B. of all a testator's freehold estates which he purchased of C. will not include a small piece of leasehold mixed up and held with the freehold, of which leasehold the testator purchased from another person the reversion in fee after the date of the devise, *Emuss* v. *Smith*, 2 De G. & S. 722; 79 R. R. 346; see Sugd. R. P. Stat. 365. A lessee for years assigned the term by way of mortgage to the immediate reversioner, who devised by the description of "my freehold houses in S. Street," and was at his death in possession as mortgagee; the mortgage debt did not pass under the devise, but formed part of the testator's personal estate, *Bowen* v. *Barlow*, L. R. 8 Ch. 171; 42 L. J. Ch. 82; 27 L. T. 733.

A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house which he held on lease for a short term. He subsequently bought and went to reside at a freehold house, where he died. *Held*, that the freehold house did not pass to the testator's widow, *In re Knight*, 34 Ch. D. 518; 56 L. J. Ch. 770; 56 L. T. 630. As to revocation of devise of real estate by operation of law, see *Jacob* v. *Jacob*, 82 L. T. 270.

In *Wheeler* v. *Thomas*, 7 Jur. N. S. 599, the will of a testator, who after the date thereof became lunatic, was held to speak as from its date and not from the death of the testator.

See also *Wedgwood* v. *Denton*, L. R. 12 Eq. 290; 40 L. J. Ch. 526; 25 L. T. 379; *Morgan* v. *Thomas*, 6 Ch. D. 176; 46 L. J. Ch. 775; 36 L. T. 689; and notes to sects. 26, 27, 33.

The specific character of a residuary devise is not altered by this

LAPSED AND VOID DEVISES.

A residuary devise shall include estates comprised in lapsed and void devises.

XXV. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee (*i*) in the lifetime of

---

Residuary devise remains specific.

section, *Hensman* v. *Fryer*, L. R. 3 Ch. 420; 37 L. J. Ch. 97; 17 L. T. 394; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; 38 L. J. Ch. 377; 20 L. T. 516; *Jackson* v. *Pease*, L. R. 19 Eq. 96; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; 44 L. J. Ch. 203. And legacies which before would have been specific remain specific, *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; 44 L. J. Ch. 589; 33 L. T. 150.

Distinction between specific and pecuniary legacies.

The distinction between a specific and a pecuniary bequest is marked and important. Thus, the bequest of a debt, or a sum of money or stock, or a watch, ascertained and distinguished from the mass of the personal estate—as a bequest of 500*l.* now due to me from A., or 500*l.* now in my desk, or 500*l.* Consols now standing in my name; or the watch which I now wear—is a specific legacy; but a bequest of money or value merely, as, of 500*l.* sterling, or 500*l.* Consols, or a gold watch, is a pecuniary or general legacy. In *Mytton* v. *Mytton*, L. R. 19 Eq. 30; 44 L. J. Ch. 18; 31 L. T. 328, a legacy of "the sum of 3,000*l.* invested in Indian securities" was held not to be specific. But see *Re Pratt*, '94, 1 Ch. 491; 63 L. J. Ch. 484; 70 L. T. 489, where a legacy of "800*l.* invested in 2½ Consols" were held specific. A definition of a specific legacy will be found in *Bothamley* v. *Sherson*, *ubi sup.*, explained in *Broadbent* v. *Barrow*, 20 Ch. D. 676; 51 L. J. Ch. 665; 46 L. T. 232; affirmed, 8 App. Cas. 812. The specific legatee, who (subject, of course, to the paramount claims of creditors) can at once fasten upon the particular thing, as being identified and appropriated by the testator himself, is preferred to the pecuniary legatee, who can only claim satisfaction in amount or value out of the personal estate at large. It follows that, if the specific thing be gone before the gift takes effect, the specific bequest must, from its very nature, wholly fail: while the pecuniary legacy will be paid in full, abate, or fail, according to the adequacy or inadequacy of the general assets. See on this subject, *In re Dowsett*, '01, 1 Ch. 398; 70 L. J. Ch. 149; *In re Vickers*, 81 L. T. 719; *In re Moses*, '02, 1 Ch. 100; 71 L. J. Ch. 101; 85 L. T. 596.

By the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, "Section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband."

(*i*) A testator, in exercise of a general power, appointed real estate to

the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect (*k*), shall be included in the residuary devise (if any) contained in such will (*l*). § 25

---

A., in trust for B.; A. survived the testator, but B. died in his lifetime; the appointment took effect and excluded those claiming in default, and the trust for B. failing by his death, the appointee is a trustee for the residuary devisee, or if none, for the heir-at-law of the appointor, *In re Van Hagan*, 16 Ch. D. 18; 50 L. J. Ch. 1; 44 L. T. 161; *Coxen* v. *Rowland*, '94, 1 Ch. 406; 63 L. J. Ch. 179; 70 L. T. 89; with which compare *Re Boyd*, '97, 2 Ch. 232; 66 L. J. Ch. 614; 77 L. T. 76, in which case it was held that the testatrix had not indicated a sufficient intention to make the appointed fund her own for all purposes.

Disclaimer.

(*k*) It is presumed that a devise which fails by reason of the disclaimer of the devisee is a devise which is "incapable of taking effect," within the meaning of the Act.

On what principle sect. 25 is to be construed.

(*l*) This section is to be construed on the principle of assimilating a residuary devise of real estate to a like bequest of personalty, *Carter* v. *Haswell*, 3 Jur. N. S. 788; 5 W. R. 388. And see Sugd. R. P. Stat. 373. But the Act does not alter the specific nature of a residuary devise, *ante*, p. 62.

Evidence of contrary intention.

Where estate X. was devised to B. in fee, and there was a residuary devise of "all my freehold hereditaments not hereinbefore devised," to the same person, B. for life, with remainders over, and B. died in testator's lifetime, the residuary devise was held to include estate X., *Green* v. *Dunn*, 20 Be. 6; and a devise of "all other real estate of which I may die possessed," is a residuary devise within this section, and will include an estate comprised in a specific devise which has lapsed on account of the death of the specific devisee in the testator's lifetime, *Cogswell* v. *Armstrong*, 2 K. & J. 229; see also *Bernard* v. *Minshull*, Joh. 276, the case of a married woman having a testamentary power of appointment. Where, by mistake, there was a specific devise to uses which, being non-existent, were incapable of taking effect, the specifically devised estate was held to be included in the residuary devise, *Culsha* v. *Cheese*, 7 Ha. 236; 82 R. R. 88; see Sugd. R. P. Stat. 373; and the decision was the same in the case of a void trust in favour of a charity, *Carter* v. *Haswell*, *ubi sup.* *Baden* v. *Bassett*, W. N. 1875, p. 5, is the other way; *sed qu.* See further as to the construction to be put upon the words "not hereinbefore disposed of," *Earl of Hardwicke* v. *Douglas*, 7 C. & F. 795.

Exercise of power of appointment.

But in order that the section may apply, there must be a residuary devise. Thus, where a married woman, having a general power to appoint by will estates A. and B., devised estate A. to her husband for

GENERAL DEVISE—COPYHOLDS, LEASEHOLDS.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*m*).

---

life, and subject thereto trustees upon the trusts after mentioned, and then devised "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person, the trusts of estate A. being to sell, pay certain legacies, and dispose of the residue for charitable purposes; the devise of "all other the hereditaments, &c." was specific, and not a residuary devise: consequently the 25th section did not apply, and the void gifts to the charities did not pass, but devolved as in default of appointment, *Re Brown*, 1 K. & J. 522. So, where a testatrix gave certain freeholds in the parish of H. to A. upon certain trusts which were declared void, and devised to B. the rest of her freeholds in the parish of H. and all her freeholds in certain other parishes, the lands given to A. did not pass under the devise to B., but were undisposed of, *Springett* v. *Jenings*, L. R. 6 Ch. 333; 40 L. J. Ch. 348; 24 L. T. 643. But see *In re Mason*, '03, A. C. 1; 72 L. J. Ch. 152; 87 L. T. 622. A devise of the rest of a testator's lands in a particular parish is not a residuary devise within the meaning of the section.

Legacies to creditors, no lapse of.

A direction by will to pay the testator's debts, including the debts not paid in full proved under a bankruptcy, was held to be a bounty, not only in favour of the creditors who survived the testator, but also of the representatives of those who predeceased him, and there was no lapse, *Turner* v. *Martin*, 7 D. M. & G. 429; 26 L. J. Ch. 216.

*Wilson* v. *Eden*.

(*m*) Where in the same will there was a gift of all the testator's personal estate to A., and a devise of all his manors, messuages, lands, tenements, and hereditaments in the counties of York and Durham, and all other his real estates, to B. and C. and their heirs, to uses, it was held by the Courts of Exchequer, *Wilson* v. *Eden*, 5 Ex. 752; 20 L. J. Ex. 73; 82 R. R. 855; and Queen's Bench, 18 Q. B. 474; 88 R. R. 667; and by Sir John Romilly, M.R., 16 Be. 153; 96 R. R. 69; that the testator's leaseholds for years passed to B. and C., being included in the

Leaseholds.

GENERAL DEVISE OR BEQUEST—APPOINTMENT.

A general gift shall include property over which the testator has a general power of appointment.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper (*n*), and shall operate as an execution of such

---

devise of land described by reference to locality, and not to A. as part of the personal estate. In that case Lord Langdale, M.R., 11 Be. 237, thought that the words "other real estate" would include only that which technically was real estate, and therefore not leaseholds. The Court of Queen's Bench considered the words to be a distinct devise, and that they were not sufficient to cut down the meaning which, under sect. 26, must be imputed to the earlier words "lands . . . in the counties of York and Durham," which would include leaseholds situated there. Leaseholds were held not to pass under a general devise of "real estate" in *Turner* v. *Turner*, 21 L. J. Ch. 843; 91 R. R. 339; and in *Butler* v. *Butler*, 28 Ch. D. 66; 54 L. J. Ch. 197; 52 L. T. 90, Chitty, J., followed the view expressed by Lord Langdale, that leaseholds would not pass under a devise of real estate described generally. See also *Best* v. *Standeven*, W. N. 1872, p. 44, and *In re Guyton and Rosenberg's Contract*, '01, 2 Ch. 591; 70 L. J. Ch. 751; 85 L. T. 66. And where the word "freehold" is prefixed to a similar general description, the leasehold will not pass, *Stone* v. *Greening*, 13 Sim. 390. See, however, the observations on this case, *In re Bright-Smith*, 31 Ch. D. 314; 55 L. J. Ch. 365; 54 L. T. 47, in which copyhold parts of a farm were held to pass under the words "my freehold farm and lands situate at E. and now in the occupation of J. B." Where a testator who had no freehold estate, but had leaseholds for a long term of years, which he thought were freehold, charged an annuity on his real estate, the leaseholds were charged therewith, *Gully* v. *Davis*, L. R. 10 Eq. 562; 39 L. J. Ch. 684. As to what is sufficient indication of a contrary intention to exclude leaseholds from a devise of lands, see *Prescott* v. *Barker*, L. R. 9 Ch. 174; 43 L. J. Ch. 498; 30 L. T. 149. A direction to convert the personal estate "except leaseholds" will not exclude leaseholds from a devise of "real estate at, in, or near" a particular locality, where the leaseholds are at, in, or near that locality, *Moase* v. *White*, 3 Ch. D. 763. A devise of "all my property whether freehold or personal and wheresoever situate," will pass copyholds, *Reeves* v. *Baker*, 18 Be. 372; 23 L. J. Ch. 599; 104 R. R. 470.

General power.

(*n*) These words refer to the extent of the power as regards the objects,

§ 27. power, unless a contrary intention shall appear by the will (*o*);

and do not require that the mode in which the power is exercised should be unrestrained; a power is none the less within the meaning of the section because it is exercisable by will only, and not by deed or otherwise *inter vivos*, *Hawthorne* v. *Shedden*, 3 S. & G. 293; *Re Powell's Trusts*, 18 W. R. 228. But of course a power, though general in terms, which is exercisable by deed only, does not fall within the statute, *Moss* v. *Harter*, 2 S. & G. 458. If the power is to be exercised by the testator by a will expressly referring to the power, this does not amount to a power to appoint "in any manner" the testator may think proper, and if the will does not refer to the power, it will not operate as an execution of it, *In re Phillips*, 41 Ch. D. 417; 58 L. J. Ch. 448; 60 L. T. 808; *Phillips* v. *Cayley*, 43 Ch. D. 222; 59 L. J. Ch. 177; 62 L. T. 86, overruling *In re Marsh*, 38 Ch. D. 630; 57 L. J. Ch. 639; 59 L. T. 595. See also *In re Tarrant's Trusts*, 58 L. J. Ch. 780. In *In re Reynolds*, '91, 3 Ch. 474; 60 L. J. Ch. 807; 65 L. T. 218, testatrix had a power to appoint freehold land to any person not being her present husband or any friend or relation of his. This was held not to be a power to appoint "in any manner" she might think proper, and therefore a general devise in the will did not act as an execution of the power. As to a power of appointment contained in a will, and not expressly revoked by a codicil to the will, which declares the trusts of the will afresh, see *In re Wood*, 83 L. T. 157.

Contrast between old and present law, as to exercise of general power.

(*o*) Under the present law it is necessary to show a "contrary intention" to exclude the exercise of a general power by a general devise or bequest, whilst under the old law it was needful to show the intention to exercise the power; the appointees are therefore now in a more favourable position than under the old law, *Lake* v. *Currie*, 2 D. M. & G. 548. There is no "contrary intention" within the meaning of the statute, unless the will contains something inconsistent with the view that the general devise or bequest was meant as an execution of the power, *Scriven* v. *Sandom*, 2 J. & H. 743. And to exclude the application of the 27th section, the "contrary intention" must have a continuing operation down to the death of the testator; the will must be taken as if executed immediately before the death, and when so taken must show on the face of it an intention of depriving the general devise of the effect given to it by the statute, *Thomas* v. *Jones*, 1 D. J. & S. 63, 83; 32 L. J. Ch. 139; 7 L. T. 610. As to what is sufficient evidence of a contrary intention, see *Pettinger* v. *Ambler*, L. R. 1 Eq. 510; 14 L. T. 118. It makes no difference whether the settlement creating the power was made by the testator himself or by a stranger, and it would seem that a codicil cannot be read with the will for the purpose of showing that a contrary intention appears by the will, *Maddick* v. *Marks*, 14 Ch. D. 422; 49 L. J. Ch. 586; 43 L. T. 40. The contrary intention must be found in the will containing the general bequest. Thus, a testator executed a

§ 27.

"testamentary appointment" under a general power, and a month later executed a will containing a residuary bequest and not referring to the testamentary appointment. Although the Court considered—looking at both documents—that the testator had probably no intention of revoking the "testamentary appointment" by the will, and executing the general power by the bequest, still, it could not look beyond the will itself, and as no contrary intention appeared therein, the effect of sect. 27 and of the general bequest was to revoke the "testamentary appointment," and to operate as an execution of the power, *In re Gibbes' Settlement*, 37 Ch. D. 143; 57 L. J. Ch. 757; 58 L. T. 11.

As to date of instrument exercising a power.

A power may be exercised by a will bearing date before the instrument which creates the power, if that instrument comes into operation in the testator's lifetime, *Stillman* v. *Weedon*, 16 Sim. 26; *Cofield* v. *Pollard*, 5 W. R. 774; *Patch* v. *Shore*, 2 Dr. & S. 589; 32 L. J. Ch. 185; 7 L. T. 554; *Boyes* v. *Cook*, 14 Ch. D. 53; 49 L. J. Ch. 350; 42 L. T. 556; *Airey* v. *Bower*, 12 App. Cas. 263; 56 L. J. Ch. 742; 56 L. T. 409. See also *In re Hernando*, 27 Ch. D. 284; 53 L. J. Ch. 865; 51 L. T. 117.

The 27th section, however, applies only to powers actually created at the death of the testator, and does not enable a testator to execute an inchoate power of which he was the intended donee under the will of a person who survives him, *Jones* v. *Southall*, 32 L. J. Ch. 130; 8 L. T. 103. In that case the intending donor of the power was a lady who had gone through the ceremony of marriage with her deceased sister's husband, and her will purported to be made under a power created by a settlement executed prior to the void marriage; the will was held to be operative, *Southall* v. *Jones*, 1 Sw. & Tr. 298; 28 L. J. P. 112.

General powers of appointment.

Under a settlement a testator had a power of appointment over estate B., but no such power over estate A.; by his will he confirmed the settlement, and devised generally all his real estate to uses different from those of the settlement; it was held that the will exercised the power and passed estate B., *Lake* v. *Currie*, 2 D. M. & G. 536. And where a testator, who under a settlement had a general power of appointment over certain leaseholds, made, for purposes different from those of the settlement, a general bequest, subject (as to such of his property as was comprised in the settlement) to that settlement which he thereby confirmed in all respects, this was held to be an exercise of the general power, notwithstanding the words confirming the settlement, *Hutchins* v. *Osborne*, 3 De G. & J. 142; 27 L. J. Ch. 421.

A testatrix (a widow), in the exercise of a power created by the will of S., appointed a sum of stock to Joseph and John and her other children equally; she appointed all the rest of the property coming to her under the will of S. to her children living at her death equally, and she constituted Joseph "her residuary legatee"; John died before her; it was held that the general residuary appointment passed John's share to Joseph; *Re Spooner's Trust*, 2 Sim., N. S. 129; 21 L. J. Ch. 151. See also *Bush* v. *Cowan*, 32 Be. 228; 4 Dav. Conv. 279.

§ 27.

A testamentary appointment of personalty, under a general power, to A. in trust for B., which trust fails by the death of B., in the lifetime of the testator, is a good appointment in favour of A., who holds as a trustee, not for the persons entitled in default of appointment, but on the same trusts as if the appointed fund had been the appointor's own property, *Chamberlain* v. *Hutchinson*, 22 Be. 444; *Brickenden* v. *Williams*, L. R. 7 Eq. 310; *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423; 39 L. J. Ch. 410. It is, however, a question of intention whether the testator meant to take the property entirely out of the instrument creating the power, *Re De Lusi's Trusts*, 3 Ir. L. R. 232; *Re Davies' Trusts*, L. R. 13 Eq. 163; 40 L. J. Ch. 566; 25 L. T. 785; *Re Pinède's Settlement*, 12 Ch. D. 667; 48 L. J. Ch. 741; 41 L. T. 579; *Hinsley* v. *Ickeringill*, 17 Ch. D. 151; 50 L. J. Ch. 364; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; 52 L. J. Ch. 331; 48 L. T. 152; *In re Thurston*, 32 Ch. D. 508; 55 L. J. Ch. 564; 54 L. T. 833. As to real estate, the exercise by the testator of a general power of appointment will cause the property appointed to vest in his personal representative under the Land Transfer Act, 1897, s. 1, in the same manner as if such property had belonged to the testator absolutely (s. 1, sub-s. (2)).

Exercise of general powers by married women.

This section is applicable to married women having testamentary powers of appointment exercisable during coverture equally with persons *sui juris*, *Bernard* v. *Minshull*, Joh. 276. The execution of a general testamentary power by a married woman makes the appointed property liable for her debts and other liabilities in the same manner as her separate estate is made liable under the Married Women's Property Act, 1882 (s. 4); and see *Godfrey* v. *Harben*, 13 Ch. D. 216. Where a married woman, or other donee of a general power of appointment over personalty, makes an appointment by will and appoints an executor, the executor is entitled to receive the appointed fund, *Hayes* v. *Oatley*, L. R. 14 Eq. 1; 41 L. J. Ch. 510; 26 L. T. 26; *Re Hoskin's Trusts*, 5 Ch. D. 229; 46 L. J. Ch. 274; 35 L. T. 935, and on appeal, 6 Ch. D. 281; 46 L. J. Ch. 817. But see *In re Thurston*, 32 Ch. D. 508; 55 L. J. Ch. 564; 54 L. T. 833. As to special power, see *Busk* v. *Aldam*, L. R. 19 Eq. 16.

General powers of appointment.

A testatrix having a general power to appoint 10,000*l.* secured by a term of years in freehold estates, and having also a general power of appointment over the estates so charged, by her will devised all her lands to A. for life, remainder to B. in tail, and she gave the residue of her personal estate to A.; it was held that the 10,000*l.* passed under the residuary gift of the personalty, *Clifford* v. *Clifford*, 9 Ha. 675.

A general devise and bequest of "all my estate and effects real and personal which I may die possessed of or entitled to" has been held to exercise a general power given to the testatrix to appoint by will any sum or sums of money not exceeding a certain sum to be raised out of the estate of the donor of the power, *In re Jones*, 34 Ch. D. 65; 56 L. J. Ch. 58; 55 L. T. 597.

§ 27.

In *Hawthorne* v. *Shedden*, 3 S. & G. 293, general pecuniary legacies were held to be payable out of personal estate over which the testatrix had a general power of appointment, although in her will no particular fund was indicated, the assets of the testatrix not comprised in the power being insufficient to pay the legacies, see Sugd. Pow. 310; *Wilday* v. *Barnett*, L. R. 6 Eq. 193. In fact, a single bequest of pecuniary legacies operates as an execution *pro tanto* of a general testamentary power of appointment over a sum of money, *Re Wilkinson*, L. R. 4 Ch. 587.

A money bequest exercises *pro tanto* a general power over a sum of money.

A married woman having a general power over personalty worth a little more than 2,600*l.*, to the interest of which she was entitled for life, and having no other property except a reversionary interest contingent on her surviving her mother (which did not happen), gave 2,600*l.* to her husband, and this was held to be a good exercise of the power independently of the statute, *Shelford* v. *Acland*, 23 Be. 10; 26 L. J. Ch. 144; and the bequest by a married woman of "the property which she might be possessed of or entitled to at her decease," was held to pass personal property over which she had only a general power of appointment, *Franchcombe* v. *Hayward*, 9 Jur. 344. That no reference to a general power is necessary in an instrument containing a general gift or devise, see further, *Harrington* v. *Harrington*, 13 Sim. 318; 13 L. J. Ch. 354; *Walker* v. *Banks*, 25 L. T., O. S. 267.

General powers of appointment.

Real estate was settled to the use of A. for life, with remainder to the use of such persons as A. should by will appoint, with power of sale and direction for re-investment in realty, and interim investment in Consols. The settled estate was sold and the proceeds invested in Consols; A. made a general bequest of all her personal estate; this operated as an execution of the power in the settlement and passed the Consols, which had been transferred to A., *Chandler* v. *Pocock*, 16 Ch. D. 648; 49 L. J. Ch. 442; 43 L. T. 112; and see *Re Harman*, '94, 3 Ch. 607; 63 L. J. Ch. 822; 71 L. T. 401. But where, after the death of the testator, who has a power of appointment over the real estate, there still exists a tenant for life who has the right to call for the re-investment in land of the Consols representing the proceeds of the sale of the real estate, the Consols are looked upon as land, and will not pass under a general bequest of the testator's personal estate, *Re Greaves' Settlement Trusts*, 23 Ch. D. 313; 52 L. J. Ch. 753; 48 L. T. 414; and see *Re Duke of Cleveland's Settled Estates*, '93, 3 Ch. 244; 62 L. J. Ch. 955; 69 L. T. 735.

Special powers, s. 27 does not apply to.

The 27th section does not apply to special or particular powers; but the old law applies, which is that the will must contain some indication, either by reference to the power or to the property subject to it, of an intention to exercise the special power, and anything showing that the testator had the power in his mind would be enough, see *Re Caplin*, 6 N. R. 17; *Russell* v. *Russell*, 12 Ir. Ch. Rep. 377; *Butler* v. *Gray*, L. R. 5 Ch. 26; 39 L. J. Ch. 291; *Evans* v. *Evans*, 23 Be. 1; 26 L. J.

§ 27.

Ch. 193; *In re Swinburne*, 27 Ch. D. 696; 54 L. J. Ch. 229; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263; *In re Mills*, 34 Ch. D. 186: 56 L. J. Ch. 118; 55 L. T. 665; *In re Esther Williams*, 42 Ch. 93; 58 L. J. Ch. 451; 61 L. T. 58; *In re Cotton*, 40 Ch. D. 41; 58 L. J. Ch. 174; *Re Huddleston*, '94, 3 Ch. 595; 64 L. J. Ch. 157. A testator making a mere general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, *In re Mills; In re Esther Williams, ubi sup.* And see *In re Hayes*, '00, 2 Ch. 332; 69 L. J. Ch. 691; 83 L. T. 152.

Where a father had power to appoint certain personalty amongst his children, his will, devising and bequeathing in general terms all his real and personal estate to a child, one of the objects of the power, was held to be inoperative as to such personalty, *Cloves* v. *Awdry*, 12 Be. 604; see also *Clogstoun* v. *Walcott*, 13 Sim. 523 (not followed in *Ferrier* v. *Jay*, and *Teape's Trusts*, *infra*); *Moss* v. *Harter*, 2 S. & G. 458; *Hope* v. *Hope*, 5 Gif. 13; *Ames* v. *Cadogan*, 12 Ch. D. 868; 48 L. J. Ch. 762; 41 L. T. 211.

Special power, exercise of, in particular case.

But in *Pidgely* v. *Pidgely*, 1 Col. 255; *Elliott* v. *Elliott*, 15 Sim. 321; 74 R. R. 88; *Cowx* v. *Foster*, 1 J. & H. 30; *Ferrier* v. *Jay*, L. R. 10 Eq. 550; 39 L. J. Ch. 686; 23 L. T. 302; *Re Teape's Trusts*, L. R. 16 Eq. 442; 43 L. J. Ch. 87; 28 L. T. 799; *Thornton* v. *Thornton*, L. R. 20 Eq. 599, special powers were held to be exercised by general gifts to the objects of the powers. These decisions in no way depended upon the Wills Act, but turned upon the words of the particular wills affording evidence of intention to exercise *some* power, as well as to dispose of the testator's own property, as in *In re Wait*, 30 Ch. D. 617; 54 L. J. Ch. 1172; 53 L. T. 336. See also *In re Mayhew*, '01, 1 Ch. 677; 70 L. J. Ch. 428; 84 L. T. 761; *Kent* v. *Kent*, '02, P. 108; 71 L. J. P. 50; 86 L. T. 536; and *In re Weston's Settlement*, '06, 2 Ch. 620; 76 L. J. Ch. 54; 95 L. T. 581.

A testator having power to charge an estate with 500*l.* in favour of his younger children, and to limit a term for securing that sum, devised the estate, subject to legacies to his younger children to the amount of 500*l.*, but without limiting any term and without referring to his power; it was held that by the will the estate was well charged with the 500*l.*, *Davies* v. *Davies*, 28 L. J. Ch. 102.

Where a testator gave a power of appointment over a sum of 30,000*l.*, which sum increased in value to 39,000*l.*, and the donee of the power in her will recited the exact words used by the donor, and so purported to appoint 30,000*l.* only, it was held that this was a valid appointment of the whole, and that the excess of 9,000*l.* was divisible among the beneficiaries in proportion to their shares as directed by the will of the donee, *In re Cruddas*, '00, 1 Ch. 730; 69 L. J. Ch. 355; 82 L. T. 514.

Power of revocation, exercise of.

A power of revocation is not exercised by an instrument of appointment referring generally to and expressed to be in exercise of every

and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper (*p*), and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*q*). § 27.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*r*). A devise without any words of limitation to pass the fee.

---

power enabling the appointor, provided there is other property to which the appointment can apply, *Pomfret* v. *Perring*, 5 D. M. & G. 775; 24 L. J. Ch. 187.

When a general power of appointment of real estate by deed or will has been completely exercised by deed, a power of revocation and new appointment being at the same time reserved, a general devise of real estate by the subsequent will of the donee of the power will not *per se* (that is without anything being done to displace the first appointment) amount, by virtue of sect. 27, to an exercise of the power of revocation and new appointment, *Charles* v. *Burke*, 43 Ch. D. 223, n.; 60 L. T. 380; *In re Brace*, '91, 2 Ch. 671; 60 L. J. Ch. 505; 64 L. T. 525. See also *In b. Merritt*, 1 Sw. & Tr. 112, and *In re Gibbes' Settlement*, *supra*, p. 67; and the note to sect. 20, *ante*, p. 41; and as to the 27th section generally, Hawkins, Constr. Wills, 27.

(*p*) See note (*n*), p. 65.

(*q*) See note (*o*), p. 66.

(*r*) This section applies to a devise of an existing estate or interest, and not to an estate or interest which the testator creates *de novo* by his will; and therefore a gift of an annuity without words of limitation is held, as it would have been before the statute, to be a gift for life only, though the annuity is charged on real estate, *Yates* v. *Madden*, 3 M'N. & G. 532; 87 R. R. 184; *Lett* v. *Randall*, 3 S. & G. 83; 107 R. R. 26; affirmed, 9 W. R. 130; *Nichols* v. *Hawkes*, 10 Ha. 342; 22 L. J. Ch. 255; 90 R. R. 384. See also *Reay* v. *Rawlinson*, 29 Be. 88.

A devise of freeholds to "A. to be kept in trust for B.; that is, A. is to let the premises, and give the rent to my son B. for his support,"

WORDS IMPORTING FAILURE OF ISSUE.

Words importing failure of issue to mean issue living at the death.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue" or "die without leaving issue" or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an

---

passed the freehold to B. absolutely, *Malcolmson* v. *Malcolmson*, 17 L. T., O. S. 44. And as before the Act a devise of rents and profits passed an estate for life, such a devise will now, by force of this section, give an estate in fee simple, *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

Gift of income, construction of, in particular case.

Though generally a gift of the income of a fund carries the corpus as well as the income when the corpus is otherwise undisposed of, *Clough* v. *Wynne*, 2 Mad. 188; *Humphrey* v. *Humphrey*, 1 Sim., N. S. 536; 20 L. J. Ch. 425; 89 R. R. 182, it was held that, under a bequest of a residue upon trust to pay the dividends of 1,500*l.* stock to A. for life, and after her death to divide the dividends "equally between B. and C. and the survivor of them," the survivor took only a life interest, there being in this will evidence of a "contrary intention" within the meaning of the section, *Blann* v. *Bell*, 2 D. M. & G. 775; 22 L. J. Ch. 236; 95 R. R. 318. See also *Wetherell* v. *Wetherell*, 1 D. J. & S. 134.

Devise without words of limitation.

The presence of words of inheritance in other parts of a will does not, with reference to a particular devise from which such words are absent, manifest such a "contrary intention" within the meaning of this section as to cut down the particular devise to an estate for life, *Wisden* v. *Wisden*, 2 S. & G. 396, 405; 97 R. R. 266.

The section does not apply to a devise with any words of limitation which, if inserted, must operate by their own force. It is immaterial whether the devise is of an estate vested in the testator, or is in execution of a power vested in him. And the Act is equally applicable to a power created by will, and would, just as in a devise of an estate, supply words of limitation so as to enable the donee of the power to appoint the fee simple, Sugd. R. P. Stat. 382.

It has not yet been decided whether this section would apply to a case where, after a devise without words of limitation, there is a devise over also without words of limitation. Lord St. Leonards was of opinion that such cases were not within the purview of the Act, and that it would be dangerous to extend it to them, Sugd. R. P. Stat. 382. And see *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

indefinite failure of his issue (*s*), unless a contrary intention § 29.

(*s*) The object of this section is to remedy the inconvenience arising from the words "dying without issue," and similar words having acquired a legal meaning different from the popular meaning, *Greenway* v. *Greenway*, 2 D. F. & J. 428; 29 L. J. Ch. 601. And mere presumption of intention is insufficient to exclude the operation of this section, *Ex parte Bate*, 1 N. R. 470. Dying without issue.

In a devise or bequest to A., but if A. dies in the lifetime of B. without leaving issue, then over, the words "without leaving issue" refer to the time of the death of B., and notwithstanding that A. left issue living at his death, the gift over will take effect, if all the issue of A. die in the lifetime of B., *Crowder* v. *Stone*, 3 Russ. 217; 27 R. R. 68; *Jarman* v. *Vye*, L. R. 2 Eq. 784; 35 L. J. Ch. 821. In *In re Booth*, '00, 1 Ch. 768; 69 L. J. Ch. 474, it was held that the words "die without child or children" meant "die without leaving child or children." See also *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754.

In a gift over in a will upon death "without leaving any child or children," it is a well settled rule of construction that these words will be construed "without having had any child who has attained a vested interest" under the previous gift. And it makes no difference in the application of this rule of construction that the testator knew at the date of the will that the person on whose death the gift over is made in fact had a child then living, *In re Cobbold*, '03, 2 Ch. 299; 72 L. J. Ch. 588; 88 L. T. 745.

The section, however, has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; and a devise to A. with a limitation over on his dying without issue "or" under twenty-one, was held ("or" being read "and") to give A. the fee on his attaining twenty-one, *Morris* v. *Morris*, 17 Be. 198; 99 R. R. 98; nor does the section apply to cases in which there are express limitations to "the heirs of the bodies" of the first takers, *Green* v. *Green*, 3 De G. & S. 480; 84 R. R. 377. See also *Dawson* v. *Small*, L. R. 9 Ch. 651.

In *Greenway* v. *Greenway* (*ubi sup.*), realty and personalty were comprised in one gift, which was so worded as to give an estate tail in the realty; but it was held, as to the personalty, that the gift over on the death of the beneficiaries without issue took effect upon their deaths without leaving issue living at their decease, and was not void for remoteness, as it would have been if the words "die without leaving issue" had been construed to import an indefinite failure of issue.

Under bequest of personalty to John and James equally, and if John shall die without issue, the property bequeathed to him shall revert to the sons of James, it was held that John did not take the absolute interest in a moiety, *In re O'Bierne*, 1 J. & L. 352.

§ 29. shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Proviso.

ESTATE OF TRUSTEES.

A devise to trustees or executors shall (with certain exceptions) pass the fee or other the whole interest of testator.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable or an estate of freehold shall thereby be given to him expressly or by implication (*t*).

---

The section applies to the case of a gift over on death "without male issue," *In re Edwards*, '94, 3 Ch. 644; 64 L. J. Ch. 179.

See also H. Sugd. Wills, 96—107; Sugd. R. P. Stat. 383—388; Hawkins, Constr. Wills, 214; Theobald, Constr. Wills, 494.

(*t*) See *Malcolmson* v. *Malcolmson*, 17 L. T., O. S. 44; *Spence* v. *Spence*, 12 C. B., N. S. 199; 31 L. J. C. P. 189; 6 L. T. 538; *Marshall* v. *Gingell*, 21 Ch. D. 790; 51 L. J. Ch. 818; 47 L. T. 859.

Devises to trustees pass the fee, when.

With respect to this and the following section, it has been said that "the general result of the two consecutive provisions seems to be, first, that a devise to a person upon *any* trust, or to an executor as such, either indefinitely or for any estate (except an estate of freehold, express or implied, or a definite term), will give the fee or other the whole interest, *notwithstanding* any indication of a contrary intention; and secondly, that a devise to a person, without such a limitation of his estate as would exclude all constructive modification, upon any trust or trusts, either not being or not including a trust to continue for life (which ingredient, by letting in the implication of an estate for life, would bring the case within the previous provision), or being or including a trust to continue for life, but capable of outlasting the life, will likewise imperatively give the fee or other the whole interest," 1 Hayes, Conv. 396. Again, "the 30th and 31st sections of the Wills Act have been described as obscure and even

Sects. 30, 31, compared.

ESTATE OF TRUSTEES.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or such beneficial interest shall be given to any person for life but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in

Trustees under an unlimited devise, where trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

---

conflicting: their meaning, however, will be apprehended by observing, that the 30th section, which speaks of a devise passing, 'the fee simple or other the whole *estate or interest* of the testator,' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees, 'the fee simple or other the whole *legal estate*' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute *legal* estate in the fee simple," Hawkins, Constr. Wills, 156. In *Freme* v. *Clement*, 18 Ch. D. 499; 44 L. T. 399, the M. R. said that sect. 31 was probably another drafting of sect. 30, and he believed the real history of the two sections was that they were two drafts dealing with the same subject, though both remain in the Act. And see *Yarrow* v. *Knightley*, 8 Ch. D. 736; 47 L. J. Ch. 874; 39 L. T. 238.

See also Sweet, Wills, 153—155; Sugd. R. P. Stat. 389 *et seq.*

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, the real estate of a person dying after the commencement of the Act (1st January, 1898) devolves to and becomes vested in his personal representatives or representative from time to time as if it were a chattel real, notwithstanding any testamentary disposition; and by sect. 2, subject to the powers, rights, duties, and liabilities in the Act mentioned, the personal representatives of a deceased person hold the real estate as trustees for the persons by law *beneficially* entitled thereto. Will trustees to whom real estate has been devised upon trusts be held to be "persons by law beneficially entitled" to such real estate within the meaning of the section? If not, the Act would seem to render it impracticable to devise real estate effectually to trustees.

§ 31. such trustee the fee simple (*u*) or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*x*).

---

Estate of trustees.

(*u*) In an unreported case of *Penrice* v. *Penrice*, where a testator devised to trustees and their heirs, in trust to accumulate the rents for twenty years, and subject thereto, to the use of A. B. for life, with remainder to the same trustees upon other trusts, and with remainders over, it was held by the Court of Common Pleas (Dec., 1848), upon a case sent by the Court of Chancery, that by virtue of this section the trustees took the fee immediately upon the testator's death. Where lands were devised to trustees, their heirs and assigns, to the use of A. during his life, with remainder to the use of such children of A. as should attain twenty-one, as tenants in common in fee, and the trustees were empowered to apply the rents for the maintenance of the children during minority, it was held (mainly on the provision as to maintenance, and without deciding whether A.'s estate was legal or equitable) that on the death of A. the legal fee was in the trustees, *Berry* v. *Berry*, 7 Ch. D. 657; 47 L. J. Ch. 182; 38 L. T. 474.

Effect of sect. 31.

(*x*) The effect of this section has been explained as follows:—"The 31st section seems to have been chiefly aimed at the doctrine, now abandoned, of a determinable fee. Its operation, in other respects, will be as follows:—1st. The original case of a devise to trustees in trust to pay the rents and profits to A. for life, and after his decease in trust for B. and his heirs, is left unaltered: the legal estate will still vest in B. after the death of A. So, in the case of a devise to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with vested remainders over: the estate of the trustees to preserve will still be restricted by implication to the life of A. 2ndly. Trusts to pay annuities will be altered. A devise to trustees in trust to pay an annuity to A. for life, and subject thereto in trust for B., will now vest in the trustees the whole legal fee simple, and not an estate during the life of the annuitant, although the annuity be payable out of the *annual* rents and profits only. 3rdly. Trusts during minority will present a difference. If the devise be to trustees in trust to apply the rents and profits for the maintenance of A. during his minority, and when A. attains twenty-one in trust for A. *during his life*, with remainders over, the legal estate will still as before vest in A. on his attaining twenty-one, inasmuch as the beneficial interest is given to him for life, and the purposes of the trust cannot continue longer. But if the devise be (after the trust during minority) in trust for A. on his attaining twenty-one, in *fee* or in tail, and not for life only, the section will apply, and the whole legal estate will remain in the trustees, so that the estate of A. will be equitable

Devise in trust to pay rents to A., for life, with remainder in trust for B.

—to pay an annuity.

—to apply rents during minority.

LAPSE OF ESTATE TAIL.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*y*). Devise of estates tail shall not lapse, when.

LAPSE—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

XXXIII. And be it further enacted, That where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person Gifts to children or other issue of testator who leave issue living at the testator's death shall not lapse.

---

only. It may be a question whether, if the trusts declared are to pay the rents and profits to *several* persons (not to one only) successively for life, with remainders over, the legal estate will vest in the trustees in fee simple or for the lives of the respective persons taking beneficial life interests." See *In re Eddels' Trusts*, L. R. 11 Eq. 559; 40 L. J. Ch. 316; 24 L. T. 223, which seems to involve a decision that in such a case the trustees do take the fee. "The section appears to apply to every case where there is no *express* limitation of the estate to be taken by the trustee, although the gifts over to the persons beneficially entitled may be in the form of a *direct devise* to them. Thus, if the gift be—'I devise Whiteacre to A. and his heirs, in trust to apply the rents and profits during the minority of B. for his benefit, and when B. attains twenty-one *I devise* Whiteacre to B.,' it would appear that the trustees must, notwithstanding the latter words, take the fee by force of the 31st section," Hawkins, Constr. Wills, 156—158. —to pay rents to several successively for life. Sect. 31 applies to every case where no express limitation of trustee's estate.

As to the operation of the Land Transfer Act, 1897, upon devises to trustees, see note to sect. 30, *ante*.

(*y*) See Sugd. R. P. Stat. 391.

§ 33. had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*z*).

---

Sect. 33, inapplicable to special, applicable to general powers of appointment.

(*z*) The provision of this section against lapse, though inapplicable to the exercise of a special power of appointment by will, *Griffiths* v. *Gale*, 12 Sim. 327, 354; 13 L. J. Ch. 286; *Holyland* v. *Lewin*, 26 Ch. D. 266; 53 L. J. Ch. 530; 51 L. T. 14, is applicable to the exercise of a general power of appointment by will, *Eccles* v. *Cheyne*, 2 K. & J. 676.

Issue not substituted, but subject-matter becomes part of estate of intended taker.

This section does not substitute the issue of the intended taker for the deceased, but makes the subject of the gift the property of the intended taker, and, as such, comprised within the dispositions of his will, notwithstanding he died before the testator, *Johnson* v. *Johnson*, 3 Ha. 157; 64 R. R. 252; 1 Hayes, Conv. 406; or descendible to his next of kin or heir-at-law, *Wisden* v. *Wisden*, 2 S. & G. 396; 97 R. R. 266; *Skinner* v. *Ogle*, 1 Rob. 363; and probate duty is payable in the same way as if the intended taker had survived the testator, *Perry's Executors* v. *The Queen*, L. R. 4 Ex. 27; 19 L. T. 520. Property bequeathed by a testator to his daughter, who died in his lifetime, but whose child and husband survived him, is not within a covenant to settle property coming to the daughter during coverture, *Pearce* v. *Graham*, 1 N. R. 507; 32 L. J. Ch. 359; 8 L. T. 378; but the husband is entitled to his curtesy, *Eager* v. *Furnivall*, 17 Ch. D. 115; 50 L. J. Ch. 537; 44 L. T. 464. Where a testator made a bequest to his daughter to be subject, if she survived him, to the trusts of her marriage settlement, and she died in his lifetime leaving issue living at his death, it was held that under sect. 33 she must, for all the purposes of the will, be taken to have survived the testator, and that the bequest must be paid to the trustees of her settlement and not to her administrator, *In re Hone's Trusts*, 22 Ch. D. 663; 52 L. J. Ch. 295; 48 L. T. 266.

Provisions against lapse.

Where a father devised to his son, who died before him leaving issue living at the father's death, and the son had left a will devising all his real estate to his father, the son was to be deemed to have survived his father, the devise to his father therefore failed, and the heir-at-law of the son was entitled, *Jones* v. *Hensler*, 19 Ch. D. 612; 51 L. J. Ch. 303; 45 L. T. 672.

Where the legatee was a married woman whose husband survived her, but also died in the testator's lifetime without having administered to his wife, limited administration was granted to a son of the legatee, *In b. Councell*, L. R. 2 P. & D. 314; 41 L. J. P. 16; 25 L. T. 763.

It does not appear to have been decided whether, as to bequests to a child of the testator which are by this section protected from lapse, the will of the child is to be construed as at the death of the child or of the parent; but whichever period is taken, the will of the child must be construed as if the will of the parent was then in existence, see *In re Mason's Will*, 34 Be. 494. And the child's estate is in the same position,

§ 33.

*quoad* the parent's will, as if he had survived the parent, *Pickersgill* v. *Rodger*, 5 Ch. D. 163.

Child *en ventre*.

A child *en ventre sa mère* would doubtless be issue left by the devisee or legatee within the meaning of this and the previous section.

A doubt arose on the words of this section, "leaving issue, and any such issue of such person shall be living at the time of the death of the testator," whether, to prevent a lapse, it was necessary that the issue of the intended recipient who is alive at the death of the testator should be the same issue who was alive at the death of the intended recipient. It has been decided that it is sufficient, to prevent a lapse, that *any* issue should be living at the death of the testator, *In b. Parker*, 1 Sw. & Tr. 523; 31 L. J. P. 8.

As to dates of the bequest, and the death of the intended taker.

The Act applies to a case where a child died before the will was made, *Winter* v. *Winter*, 5 Ha. 306; 71 R. R. 122; *Mower* v. *Orr*, 7 Ha. 473; 82 R. R. 191; *Barkworth* v. *Young*, 4 Drew. at p. 19.

Sect. 33 not applicable to gifts to classes.

This section does not apply where the gift is to the testator's children or grandchildren as a class, *Olney* v. *Bates*, 3 Drew. 319; 106 R. R. 368; *Browne* v. *Hammond*, Joh. 210, even if, in the events which happen, the class may consist of but a single individual, *In re Harvey's Estate*, '93, 1 Ch. 567; 62 L. J. Ch. 328; 68 L. T. 562; see also *Stansfield* v. *Stansfield*, 15 Ch. D. 84; 49 L. J. Ch. 750; 43 L. T. 310. Where the bequest was to the testator's "children living at his death," and one child, Henry, died leaving issue, it was held that the representatives of Henry took nothing, and that the other children alone were entitled, *Fullford* v. *Fullford*, 16 Be. 565. But where the gift was to a class, and the share of each daughter was settled upon her for life, and after her death for her children, the children of a daughter who died before the testator were entitled to share, *Unsworth* v. *Speakman*, 4 Ch. D. 620; 46 L. J. Ch. 608; 35 L. T. 731; but this case was not followed in *In re Roberts*, 30 Ch. D. 234; 53 L. T. 432.

Where the gift was to trustees upon trust for testator's four sisters (by name) in equal shares, "Provided always, and I declare that my trustees shall retain the share of each of my sisters upon the trusts following," which were for each sister for life with remainder to her issue, and one of the sisters died in the lifetime of the testator, the direction to the trustees to hold the share on trust saved the share from lapsing, and the sister's children were accordingly held entitled thereto, *In re Pinhorne*, '94, 2 Ch. 276; 63 L. J. Ch. 607; 70 L. T. 901. This case was followed in *In re Powell*, '00, 2 Ch. 525; 69 L. J. Ch. 788; 83 L. T. 24, and *In re Whitmore*, '02, 2 Ch. 66; 71 L. J. Ch. 673; 87 L. T. 210.

Does sect. 33 apply to trust estates?

It has been doubted whether sect. 33 applies to estates vested in the testator as trustee. This question has been rendered, by sect. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), one of diminishing importance.

Does the section apply to a devise or bequest by a testator to a child

WHEN ACT OPERATES.

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who died before 1838.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished or revived by any codicil shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed republished or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight (*a*).

SCOTLAND.

Act not to extend to Scotland.

XXXV. And be it further enacted, That this Act shall not extend to Scotland (*b*).

---

or other issue of property to be held by the devisee or legatee upon trusts? The editor of the present edition knows of no authority upon the point. If it should be held that the section does apply to devises and bequests in trust, this further question may arise:—Will the property so devised or bequeathed be deemed to have been vested in the deceased devisee or legatee so as to render the provisions of sect. 30 of the Conveyancing Act, 1881, applicable?

(*a*) Having regard to the fact that more than seventy years have elapsed since the Act came into operation, the editor of the present edition has thought it unnecessary to continue the note to this section which was contained in previous editions.

Scotland.

(*b*) As to land in Scotland, see sect. 20 of The Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), and sects. 46 and 51 of the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94). By the joint effect of these Acts with 24 & 25 Vict. c. 114 (see Appendix on Domicile), land in Scotland may now be devised by a will made in England and in English form, and unless expressly excepted it will pass by a general devise in an English will.

Adoption of the Wills Act in the Colonies.

The Wills Act, with a few immaterial variations, was adopted by the Legislative Council of our Indian possessions (Act of Council, 1838, No. 25), as from the 1st February, 1839, see *In b. Foy*, 2 Cur. 329; *Casement* v. *Fulton*, 5 Moo. P. C. 130; 70 R. R. 19; but the formalities of execution and attestation are now governed by the Indian Succession Act of 1865. In the Australian colonies, the adoption dates generally from the 1st January, 1840; see New South Wales Colonial Acts, 3 Vict. No. 5, 17 Vict. No. 5; Victoria Colonial Acts, 18 Vict. No. 19, 27 Vict. No. 222; South Australia Colonial Acts, 5 Vict. No. 16, 25 & 26 Vict.

AMENDMENT.

XXXVI. [Repealed by 37 & 38 Vict. c. 35] (*c*).

---

No. 15; Queensland Colonial Act, 31 Vict. No. 24; Western Australia Colonial Acts, 2 Vict. No. 1, 18 Vict. No. 13; Tasmania Colonial Acts, 4 Vict. No. 9, 16 Vict. No. 4; New Zealand Colonial Acts, 18 Vict. No. 1, 21 & 22 Vict. No. 2. The English Act was in substance adopted in Jamaica, as from the 1st January, 1841 (Colonial Acts, 3 Vict. No. 51, 25 Vict. No. 26). In Upper Canada many of the important provisions of the Statute of Wills were anticipated by the Colonial Act, 4 Will. 4, No. 1, and are incorporated in the Revised Statutes of 1877, No. 106; as to Lower Canada, see 14 Geo. 3, c. 83, s. 10, amended by Colonial Act, 41 Geo. 3, No. 4, and the Colonial Code Civil of 1866, Articles 842—854. The Revised Code of Nova Scotia (passed in 1851) embodied the principal provision of the English Act, and these are now contained in the Revised Code of 1866, No. 112. As to the Hudson's Bay Company's Settlements, see *In b. Sutherland*, 4 No. Cas. 563. But such of our colonies as have been conquered or ceded retain for the most part a foreign system of law; see as to the Mauritius, *In b. Smith*, 2 Rob. 335; *Lagesse* v. *Allard*, L. R. 4 P. C. 553; 42 L. J. P. C. 37. And, generally, as to the colonial law of wills, see 4 Dav. Con. 350.

The Manx Wills Act, 1869, adopts many of the provisions of the English Act of 1837. Isle of Man.

(*c*) The Act remains intact with the following exceptions:— Repeal.

(1) Section 2 has been repealed by The Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35).

(2) Section 8 has been virtually repealed by The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(3) Section 9 has been amended by 15 & 16 Vict. c. 24 (*supra*)—or rather, the section has been explained, and the construction originally placed upon it by the Ecclesiastical Court has been negatived.

(4) Section 12 has been repealed by The Admiralty, &c., Acts Repeal Act, 1865 (28 & 29 Vict. c. 112); and provision respecting the wills of petty officers and seamen of the Royal Navy and Marines, so far as relates to their wages, prize money, bounty money, or any money or effects in charge of the Admiralty, is now made by 28 & 29 Vict. c. 72, for which see *ante*, p. 32 *et seq.*

(5) Section 36 has been repealed by The Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35).

15 & 16 V. c. 24.

## THE WILLS ACT AMENDMENT ACT, 1852.

### 15 & 16 Vict. c. 24.

*An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills."*

[17th June, 1852.]

Whereas the laws with respect to the execution of wills require further amendment: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords-spiritual and temporal and Commons in this present Parliament assembled and by the authority of the same, as follows:—

When signature to a will shall be deemed valid.

1. Where, by an Act passed in the first year of the reign of her Majesty Queen Victoria intituled "*An Act for the Amendment of the Laws with respect to Wills*" it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; every will shall, so far only as regards the position of the signature of the testator or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*d*), and that no such will shall be affected by

Cases on the Wills Act Amendment Act, 1852.

(*d*) See *In b. Gausden*, 2 Sw. & Tr. 362; 31 L. J. P. 53; 5 L. T. 767; *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156; 2 L. T. 519; *Cook* v. *Lambert*, 3 Sw. & Tr. 46; 32 L. J. P. 93; 8 L. T. 211, in which case probate was decreed where the mark of the testator and the signatures of the witnesses were on a separate piece of paper, attached by wafers to that on which the body of the will was written. See also *In b. Jones*, 4 Sw. & Tr. 1; 34 L. J. P. 41; 13 L. T. 210; *In b. Wright*, 4 Sw. & Tr. 35; 34 L. J. P. 104; 13 L. T. 195; *In b. Williams*, L. R. 1 P. & D. 4; 35 L. J. P. 2; 13 L. T. 304; *In b. Coombs*, L. R. 1 P. & D. 302; 36 L. J. P. 25; 15 L. T. 363. In *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. 42; 11 L. T. 749, the testator and witnesses

the circumstances that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*e*), or by the circumstances that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*f*), or shall follow or be after or under the clause of attestation either with or without a blank space

signed each of five sheets; on the sixth were the testimonium and attestation, and the signatures of the witnesses, but not of the testator: although the dispositive part of the will was complete in the five sheets, the Court could not admit those sheets to probate; there was no signature at the foot or end of the will. See also *In b. Dilkes*, L. R. 3 P. & D. 164; 43 L. J. P. 38; 30 L. T. 305; *Margary* v. *Robinson*, 12 P. D. 8; 56 L. J. P. 42; 57 L. T. 281; *In b. Hughes*, 12 P. D. 107; 56 L. J. P. 71; 57 L. T. 495.

(*e*) See *In b. Howell*, 1 Rob. 671; *In b. Beadon*, 2 Rob. 139. But in *In b. Anstee*, '93, P. 283; 63 L. J. P. 61, the signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will which was continued on the second page. Probate was granted of the first page of the will. And see *Royle* v. *Harris*, '95, P. 163; 64 L. J. P. 65; 72 L. T. 474.

Signature in testimonium or attestation clause.

(*f*) Decisions to this effect were given before the passing of this Act, *In b. Gunning*, 1 Rob. 459, where the testator's signature was in the testimonium clause; and *In b. Woodington*, 2 Cur. 324, where the signature was in and formed part of the attestation clause. See also *In b. Chaplyn*, 10 Jur. 210; *In b. Dinmore*, 2 Rob. 641. Questions may still arise as to whether the signature of the testator in the testimonium or attestation clause was intended for the testator's signature to the will; for example, where the whole of either of these clauses is in the handwriting of the testator. In *In b. Mann*, 28 L. J. P. 19, the signature of the testator in the testimonium clause (the whole of which clause was in his own handwriting) was held, after some hesitation, to be good. And where the testator read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed, it was, under the circumstances proved, held that the testator intended to give effect to the will by the signature in the attestation clause, and probate was granted, *In b. Walker*, 2 Sw. & Tr. 354; 31 L. J. P. 62; 5 L. T. 766. See also *Smith* v. *Smith*, L. R. 1 P. & D. 143; 35 L. J. P. 65; 14 L. T. 417; *In b. Huckvale*, L. R. 1 P. & D. 375; 36 L. J. P. 84; 16 L. T. 434; *In b. Casemore*, L. R. 1 P. & D. 653; 38 L. J. P. 54; 20 L. T. 497; *In b. Pearn*, 1 P. D. 70; 45 L. J. P. 31; 33 L. T. 705.

15 & 16 V. c. 24.

intervening (*g*), or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (*h*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature (*i*), or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*k*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (*l*), or which follows it, nor shall it

(*g*) See *Hunt* v. *Hunt*, L. R. 1 P. & D. 209; 35 L. J. P. 135; 14 L. T. 859.

(*h*) See *In b. Puddephatt*, L. R. 2 P. & D. 97; 39 L. J. P. 84.

(*i*) *In b. Archer*, L. R. 2 P. & D. 252; 40 L. J. P. 80; 25 L. T. 274. The testator's signature and the testimonium and attestation clauses were written on a separate paper, attached to the will by a string just opposite the end of the writing; the execution was held valid, *In b. Horsford*, 3 P. & D. 211; 44 L. J. P. 9; 31 L. T. 553.

(*k*) A will entirely filled six pages of letter paper, there being no room for an attestation clause on the sixth page; the testatrix signed each of the six pages, and her signature and the attestation clause were on the top of the seventh page; this last signature was the only one made in the presence of or seen by the attesting witnesses. It was held that, under the Amendment Act, the will was entitled to probate, *In b. Brown*, 16 Jur. 602.

(*l*) Words were, before the execution of the will, written on the left of and a little lower than the place of the testator's signature; these words were not admitted to probate, although the Court was of opinion that, strictly speaking, they were neither "*underneath*," nor did they "*follow*," the testator's signature, *In b. Greata*, D. & Sw. 266; see also *In b. Topham*, 14 Jur. 47; *In b. Peach*, 1 Sw. & Tr. 138; *In b. Kimpton*, 3 Sw. & Tr. 427; 33 L. J. P. 153; 10 L. T. 137; *In b. Woodley*, 3 Sw. & Tr. 429; 33 L. J. P. 154. See, however, *In b. Ainsworth*, L. R. 2 P. & D. 151; 23 L. T. 324. In *In b. Greenwood*, '92, P. 7; 61 L. J. P. 56; 66 L. T. 61, the will did not contain any nomination of executors in the body of it, but at the bottom, below the attestation clause, and after the signatures, were the words "executors, W. G. and C. S." There was an asterisk before these words and an asterisk before the

give effect to any disposition or direction inserted after the signature shall be made (*m*). **15 & 16 V. c. 24.**

Act to extend to certain wills already made.

**2.** The provisions of this Act shall extend and be applied to every will already made where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property not being within the jurisdiction of the Ecclesiastical Courts has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will by a Court of competent jurisdiction in consequence of the defective execution of such will (*n*).

Interpretation of "will."

**3.** The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be

---

word "executor" wherever it occurred in the will. It having been proved that the words were written before the execution of the will, the nomination of executors was allowed to be included in the probate. See also *In b. Burt*, L. R. 2 P. & D. 214; 40 L. J. P. 26; 24 L. T. 142. But where the concluding words of disposition followed the signature of the testator and there was nothing to connect the words with the signature, these words were excluded from probate, *In b. Malen*, 54 L. J. P. 91. In the case of the will of an Englishman made in France, a notarial minute of the execution of the will was written on the same sheet as and immediately following the will; the testatrix and the witnesses signed their names at the foot of this minute. The Court held the execution valid, *Page* v. *Donovan*, D. & Sw. 278. See also *In b. Willmott*, 1 Sw. & Tr. 36; *In b. Cattrall*, 3 Sw. & Tr. 419; 33 L. J. P. 106; *In b. Powell*, 4 Sw. & Tr. 34; 34 L. J. P. 107; 13 L. T. 195; *In b. Dallow*, L. R. 1 P. & D. 189; 35 L. J. P. 81; 14 L. T. 573.

(*m*) See *In b. Arthur*, L. R. 2 P. & D. 273; 25 L. T. 274; *In b. Wotton*, L. R. 3 P. & D. 159; 43 L. J. P. 14; 30 L. T. 75; *In b. Anstee*, '93, P. 283; 63 L. J. P. 61; *Royle* v. *Harris*, '95, P. 163; 64 L. J. P. 65; 72 L. T. 474; *In b. Gilbert*, 78 L. T. 762; and *In b. Gee*, 78 L. T. 843.

(*n*) By this section, every will which had not, prior to the 17th June, 1852, been pronounced to be defectively executed, is brought within the operation of the amending Act.

15 & 16 V. c. 24.

interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her Majesty Queen Victoria.

Short title.

**4.** This Act may be cited as "The Wills Act Amendment Act, 1852."

A

PRACTICAL VIEW

OF

# THE WILLS ACT.[a]

General condition of the old law.

In the long struggle to enrol among our civil rights the power of testamentary disposition—one of the last consummate fruits of a refined policy—when, as war had preoccupied the land and superstition bespoken the goods, every point was to be carried against feudal or ecclesiastical repugnance, it is not difficult to suppose that a mass of laws would be generated, neither enlightened, comprehensive, nor coherent. The different degrees of dignity and value, naturally attached by our ancestors, in times of chieftainship and violence, to moveable and immoveable property, and again, as regards the soil, to the tenure of the sword and of the plough, to freehold and to leasehold interests, and the different jurisdictions under which territorial and commercial wealth consequently fell, embarrassed the growth of the much-coveted dominion with numerous distinctions, in themselves artificial and arbitrary, and in their consequences inconvenient, often unjust. Under such various and conflicting influences, both the right of disposing and the forms of disposition were capriciously modified; opposite codes were formed; the law, as respects realty, continued too strict; as respects personalty, grew too lax; and at the period of the legislative revision of this interesting branch of our

(*a*) The following essay has been left untouched as it appeared in previous editions. I have merely added notes wherever I thought that there was occasion therefor.—J. B. M.

jurisprudence, when the Wills Act was passed, its general characteristics were complication, diversity, uncertainty. To what extent, and with what success, a remedy has been applied, it will be one of our objects to show, in the observations which we are about to offer on this statute (*b*) "For the Amendment of the Laws with respect to Wills."

The testamentary power, how affected by the testator's domicile.

But, as we do not address ourselves to the learned reader exclusively, it may be useful to preface our remarks upon the statute, by observing that the validity, construction, and effect of testamentary dispositions are determined, as to immoveable property (including chattels real), by the law of the State within which the subject-matter has its fixed existence; but, as to moveables, which are supposed to accompany our motions, and which really sympathise in our fortunes, by the law of the State within which the testator, at the time of his death, had his domicile or *home* (*c*). Hence, to a greater or a less extent, the self-expatriated Englishman stands excluded from, among other natal and inestimable rights, the advantages held out by the testamentary laws of his country, which breathe the generous freedom of its other institutions. The chief and peculiar advantage of those laws, which he thus in part renounces, consists in the absolute subjection of all his property, real and personal, to his ultimate volition. The law of England, wisely directing its paternal care to the great family of the State, confided private and particular interests to the dictates of natural and moral feeling, and has not repented of its confidence. There have been cases indeed, but such are of rare occurrence, in which, under peculiar circumstances, wills unnaturally injurious to the near relatives of the testator have been successfully impeached on the ground of mental delusion; otherwise, by our law, husbands and parents may leave all their property, without question, to strangers (*d*).

Comparative freedom of the English testamentary law.

(*b*) 1 Vict. c. 26.

(*c*) See the Appendix, on Domicile.

(*d*) See *Rawlins* v. *Goldfrap*, 5 Ves. 444; *Ruttinger* v. *Temple*, 4 B. & S. 491; 33 L. J. Q. B. 1; 9 L. T. 256; *Boughton* v. *Knight*, L. R. 3 P. & D. 64; 42 L. J. P. 25; 28 L. T. 562.

This unfettered dominion would, if abused, call for legislative restraint; but while discreetly enjoyed, or rather, while suspended over all, even the most natural expectants, it operates more beneficially than the jealous code of France, which, by limiting the testamentary power to a certain proportion of the testator's possessions, discourages industry, tends continually to a more and more minute sub-division of capital, and curtails the means of promoting obedience, gratitude, affection, within the domestic sphere most adorned by the exercise of those virtues.

We now proceed to the principal subject of this Dissertation.

In what respects the law is altered by the Wills Act.

The Wills Act, whether considered as an enabling, a restraining, or an expounding Act, affects the previous scope and construction of testamentary dispositions to an extent which renders the study of its provisions one of the most important duties of every professional man, and some knowledge of their general bearing matter of deep interest to all. They will be found to relate chiefly to the personal ability of the testator; to the subjects of testamentary disposition; to the exercise of testamentary powers of appointment; to the execution and attestation of wills; to the competency of attesting witnesses; to the revocation and alteration of wills; to the doctrine of lapse in particular cases; and to the construction of wills in certain respects. In regard to each of these matters, the old testamentary rights have been enlarged, abridged, or modified; but the predominating feature of the statute, and what, indeed, constitutes its chief excellence, is the assimilation, as to some points of general importance, of the law of real and the law of personal estate (*e*). This has been effected, for the most part, by

Terms "personal estate," &c., defined.

(*e*) The term "personal estate," as used in the text, generally includes leaseholds for years, technically called chattels real, as well as money, goods, &c., technically called chattels personal; and the term "real estate," as there used, includes almost all interests, not being leases for years, in land of every tenure. But where the real and personal estate are to go in different ways, care must be taken, in the wording of general devises or bequests, to avoid any question on the operation of sect. 26

allowing an ampler testamentary dominion over the former; though at the cost, in some respects, of privileges (not to be lightly estimated in a free country) before peculiar to the latter. The intention of the unlearned testator is no longer liable to be frustrated by the feudal laws of tenure; the same positive law now regulates the will of realty and the testament of personalty; that law, amended and compressed within one statute of moderate dimensions, may now be consulted, with comparative facility, by all; and the difficulties are reduced, in a great measure, to those which attend the exposition of all written documents, and which, as they sometimes present themselves even in perusing the Act itself, cannot but fall largely to the share of a man's last will and testament;—an instrument vainly imagined to possess, whether from long judicial indulgence, or from some peculiar sanctity of character (*f*), the virtue of conveying the clearest ideas in the loosest language.

Repeal of the old statute law.

The whole mass of former enactments respecting wills is repealed in the outset (*g*), and the statute then proceeds to build up, partly on the old foundations and with the old materials, but with unequal skill, what must long form the great institute of English testamentary law.

---

Leaseholds for years.

of the Act. Leaseholds, for the purposes of the Succession Duty Act (16 & 17 Vict. c. 51), are deemed real property, and chargeable as such with succession duty (ss. 1, 19). In the strictest technical sense the terms "will" and "devise" are appropriated to real estate; and the terms "testament," "bequest," and "legacy," are appropriated to personal estate; but the terms "will," "testator," and "testamentary," are commonly used, as in the text, with reference to either species of property. "Will" and "last will" are synonymous, for a will becomes operative as a will only on the death of the testator, *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R. 138.

(*f*) Wills are said to be entitled to a liberal construction for the benefit of the soul of the testator, "Car le volunt de chescun home serra prise ou construe en le pluis large manner que il poet estre reasonablement pur le benefit de le alme de le mort" (T. 17, Henry 7; Kei. 44 b).

(*g*) Sect. 2. But certain provisions of 12 Car. 2, c. 24, are not repealed. And sect. 2 of the Act is now itself repealed (37 & 38 Vict. c. 35), but such repeal does not revive the Acts repealed by sect. 2.

I. The old distinction in regard to the qualifying age, between wills of real and testaments of personal estate, and again, as to the latter, between the sexes—a distinction which denied to all persons under twenty-one the power of devising real estate unless by special custom, but permitted boys (*h*) of fourteen and girls of twelve to bequeath any amount of personal estate—is abolished.

I. As to the testator's personal ability.

The statute requires that every testator shall be of the age of twenty-one years (*i*); nor can this enactment be evaded by creating an express power to appoint notwithstanding minority (*k*), or by any other means. Married women were left under the same disability to make a will as before the statute (*l*).

Minors disqualified by the statute.

By the Naturalization Act, 1870 (*m*), real and personal property of every description may be held and disposed of by an alien (*n*) in the same manner as by a natural-born British subject. This Act, however, does not deal with the question of what is to be the form of the will; as to personalty this is left to be determined according to the law of the alien's country (*o*). The Act is not retrospective (*p*).

Aliens.

Here we may be allowed to make a digression for the purpose of presenting the reader with a summary of the law in regard to testamentary capacity. The persons, then, incapable, wholly or partially, of making a will, are:—

Summary of the existing law as regards personal ability to dispose by will.

1. Minors without any exception or qualification whatever (*q*).

Minors.

---

(*h*) See 1 Wms. Exors. pt. 1, bk. 2, ch. 1, generally as to testamentary capacity.

(*i*) Sect. 7.

(*k*) Sugd. Pow. 178, 910.

(*l*) Sect. 8. See 34 & 35 Hen. 8, c. 5, s. 14. But see now the Married Women's Property Acts, 1882 and 1893.

(*m*) 33 & 34 Vict. c. 14.

(*n*) See *De Geer* v. *Stone*, 22 Ch. D. 243; 52 L. J. Ch. 57; 47 L. T. 434.

(*o*) *In b. Von Buseck*, 6 P. D. 211; 51 L. J. P. 9.

(*p*) *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; 41 L. J. Ch. 576; 26 L. T. 142.

(*q*) But see the notes to sects. 7 and 11, as to the will of personal estate of a soldier in active service, or a seaman at sea.

Married women.

2. Married women, except for the special purpose of appointing an executor to continue the personal representation of a testator (*r*) of whose will the *feme* is herself the sole or the surviving executrix, unless enabled by a power (*s*), which some previous settlement or will not unfrequently confers, or possessed of personal property settled to the separate use of the wife; or unless the husband be banished by Act of Parliament, or have abjured the realm, when the wife's capacity revives (*t*); for although it is true that a married woman may, with the assent of her husband, make a valid testamentary disposition of personal estate not settled to her separate use (*u*), yet as such disposition really derives its effect from his sanction, and is not the result of her independent volition, it is not, properly speaking, her *will*. By the Married Women's Property Act, 1882, a married woman may, as to her separate property, dispose thereof by will in the same manner as if she were a *feme sole* (*x*).

Persons of unsound mind.

3. Persons not of a sound disposing mind, whether from idiocy, insanity, lunacy—unless the testamentary act be the fruit of a lucid interval—drunkenness, or any other cause; and here we may suggest with respect to testators of weak understanding, generally, that they should be required to give written instructions, which, if evincing mental power, may be useful as evidence of competency, in aid, at least, of other proof. The presumption that every man is sane until the contrary is proved, is a mixed presumption of law and fact. It is not to be assumed, as a matter of law, that a will is made by a competent testator, but the Court or jury must be convinced of the competency. Therefore, he who relies upon a will in opposition to the heir-at-law, must produce evidence that the

Competency of testator.

(*r*) Shep. Touch. 402; *In b. Bayne*, 1 Sw. & Tr. 132; and see *In re Herbert's Will*, 8 W. R. 272.

(*s*) Sugd. Pow. ch. 5, s. 1, pp. 157—177.

(*t*) *Countess of Portland* v. *Prodgers*, 2 Ver. 104; *Ex parte Franks*, 1 Moo. & S. 1; *In b. Martin*, 2 Rob. 405.

(*u*) *Hearle* v. *Greenbank*, 3 Atk. 716; *Mariot* v. *Kinsman*, Cro. Car. 219; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. s. 75; *In b. Smith*, 1 Sw. & Tr. 127.

(*x*) See *ante*, pp. 9 and 62.

testator was a person of sound and disposing mind; [and when such evidence has been produced, it is incumbent on the party alleging the testator's incompetency, to prove that the incompetency existed] (*y*).

Insanity.

Where a commission in lunacy has issued, and a jury has found that the subject of the commission is of unsound mind, the presumption [of law, in favour of parties to the commission (but not as to third parties (*z*))] is, that the verdict is well founded, and, if the commission be not superseded, that the person continues a lunatic down to his death. Thus, a will made by a person who had been found lunatic by inquisition, but who had recovered his sanity before his death, was pronounced against (*a*), in which case the commission was not superseded. But this presumption of law may be rebutted by positive evidence of entire or partial recovery (*b*); though, of course, when a will is set up, made by a testator during the subsistence of a commission of lunacy against him, the *onus probandi* lies upon the person propounding the will to establish the complete or temporary recovery of the lunatic, at the times of giving instructions for and executing his will (*b*). In *Dimes* v. *Dimes* (*c*), a will made by a testator of fluctuating capacity was found to have been made in a lucid interval, and was held good. And in *Nichols* v. *Binns* (*d*), where the testator had for years been

Lucid interval.

(*y*) *Sutton* v. *Sadler*, 5 W. R. 880. In my opinion, the words enclosed within the first pair of brackets do not accurately represent the ruling of the Court in *Sutton* v. *Sadler*, 5 W. R. 880. The reader is referred to that case.—J. B. M.

(*z*) *Snook* v. *Watts*, 11 Be. 105. In my opinion, the words enclosed within the second pair of brackets are misleading. "Although the finding of a person's insanity by inquisition in lunacy is not binding upon third parties, still it destroys the natural presumption of sanity, and casts the burthen of proving the person's sanity on the party alleging it." Lord Langdale, M.R., in *Snook* v. *Watts*, *ubi sup.*—J. B. M.

(*a*) *Grimani* v. *Draper*, 6 No. Cas. 418.

(*b*) *Ib.*; *Cooke* v. *Cholmondeley*, 2 M'N. & G. 18; 19 L. J. Ch. 81; 86 R. R. 7; *Prinsep* v. *Dyce Sombre*, 10 Moo. P. C. 232.

(*c*) 10 Moo. P. C. 422.

(*d*) 1 Sw. & Tr. 239.

habitually insane, but with intermissions, and the will was actually executed in a lunatic asylum, the jury having found that it was executed in a lucid interval, probate was decreed. In that case the instructions for the will were designed and written by the testator himself, without assistance, and the will made a natural and equitable disposition of his property; which latter fact was held to be, though not conclusive, strong evidence of the instrument having been made in a lucid interval. Again in *Symes* v. *Green* (*e*), it was held that if a will, rational on the face of it, is shown to be duly executed, the presumption is that it was made by a person of competent understanding; the testator in that case was subject to insane delusions, the will was in his handwriting, perfectly rational, and in no way connected with or referring to the subject of the delusions; but the circumstances in evidence counterbalanced the presumption of competency, and the decree was against the will. *Waring* v. *Waring* (*f*) is an important case, in which also the testatrix was subject to delusions, and had been found insane by inquisition, but subsequently to the execution of her will: that document, on the face of it, betrayed no marks of insanity, but it was pronounced against by the Privy Council, in affirmation of the Court below; in delivering the judgment of the Judicial Committee, Lord Brougham entered at length into an exposition of the legal doctrine of monomania (*g*). But delusions may co-exist with testamentary capacity; if the testator comprehends the extent of the property to be disposed of, and the nature of the claims of those he excludes, partial unsoundness, not affecting the general faculties and operating in regard to testamentary disposition, is insufficient to render him incapable of making a will (*h*).

Monomania.

Delusions.

(*e*) 1 Sw. & Tr. 401; 28 L. J. P. 83.

(*f*) 6 Moo. P. C. 341; 79 R. R. 73.

(*g*) See also *Greenwood* v. *Greenwood*, 3 Cur. App. i.; *Fowlis* v. *Davidson*, 6 No. Cas. 461; *Johnson* v. *Blanc*, 6 No. Cas. 442; *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398; 36 L. J. P. 97; 16 L. T. 841.

(*h*) *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; 39 L. J. Q. B. 237; 22 L. T. 813. See also *Boughton* v. *Knight*, L. R. 3 P. & D. 64; 42 L. J. P. 25; 28 L. T. 562; *Smee* v. *Smee*, 5 P. D. 84; 49 L. J. P. 8; *Jenkins* v.

As to incapacity from drunkenness or any other cause, see *Garthside* v. *Isherwood* (*i*). Drunkenness.

Mere eccentricity must not be confounded with insanity or monomania (*k*). In *Freer* v. *Peacocke* (*l*), it was held that moral insanity, or a moral perversion of the feelings, unaccompanied with delusion, is insufficient to invalidate a will; the eccentricity of the testator must be resolved into intellectual insanity (*m*). Eccentricity not to be confounded with insanity.

---

*Morris*, 14 Ch. D. 674; 42 L. T. 817; *Hope* v. *Campbell*, '99, A. C. 1; *Pilkington* v. *Gray*, '99, A. C. 401; 68 L. J. P. C. 63.

(*i*) Shep. Touch. 403; and Swinb. 133.

(*k*) *Dew* v. *Clarke*, 3 Add. 97. See also J. S. Mill, On Liberty, ch. 3.

(*l*) 1 Rob. 422.

(*m*) See also *Goddard* v. *Vere*, 4 No. Cas. supp. ix.; *Wellesley* v. *Vere*, 1 No. Cas. 240; *Austen* v. *Graham*, 8 Moo. P. C. 493.

Mr. A. Wood-Renton has very kindly given me permission to insert in this place the following eight propositions which were formulated in an article from his pen entitled "Testamentary Capacity in Mental Disease," which appeared in *The Law Quarterly Review* of October, 1888. The authorities upon which these propositions were founded are discussed in the article in question, and more fully in Wood-Renton on Lunacy.

I. A testator must possess a memory sufficiently active to recall the nature and extent of his property, and the persons who have claims upon his bounty; and a judgment and will sufficiently free from the influence of morbid ideas or external control to determine the relative strength of those claims.

II. Intellectual insanity *primâ facie* destroys testamentary capacity; but this presumption may in any case be rebutted by evidence of a lucid interval; or that the insanity and delusions of the testator were irrelevant to the subject-matter of his will, or insufficient to prevent the exercise of a disposing memory, judgment, and will, at the time when the disputed instrument was made.

III. A lucid interval is not necessarily a complete restoration to mental vigour previously enjoyed; nor is it merely the cessation or suppression of the symptoms of insanity; it is the recovery of testamentary memory, judgment, and will as defined in Proposition I.

IV. An insane delusion is not merely an unfounded, though colourable, suspicion; nor even a belief which no rational person would have entertained; it is a persistent and incorrigible belief of things as real which exist only in the imagination of the patient, and which no rational person can conceive that the patient when sane would have believed.

Imbecility and doubtful capacity.

In cases of imbecility, and weak or doubtful capacity, it seems impossible to lay down any general rule; the question is always one of degree, and of that question the particular circumstances in each instance must dispose (*n*).

Undue influence.

Closely, and almost inseparably, connected with questions of imbecility and doubtful capacity, are those of undue influence. In order to set aside on this ground the will of a person of testamentary capacity, it must be shown that the circumstances under which the will was executed are inconsistent with any hypothesis but that of undue influence: the exercise of undue influence cannot be presumed; it must be proved to have been exercised, and exercised, moreover, in relation to the will itself, and not merely to other transactions (*o*). Undue influence, in a popular sense, may exist in the form of bad companionship and bad example, but this is not sufficient to invalidate a will made under its operation. In order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, it must be an influence exercised either by coercion or by fraud; allowing a fair latitude in the interpretation of those terms: thus actual violence is not necessary to constitute coercion; but imaginary terrors may be sufficient to deprive the testator of

---

V. Neither subsequent suicide nor supervening insanity will be reflected back upon previous eccentricity, so as to invalidate a will; *aliter* in the case of previous insanity.

VI. Affective, or moral, insanity does not (generally?) destroy testamentary capacity.

VII. Upon the executor who propounds a will rests the burden of proving (a) testamentary capacity, (b) knowledge and approval of contents, and (c) due execution.

VIII. *Primâ facie* an executor is justified in propounding his testator's will.

The above propositions, clothed as they are with the authority of their author, and giving, as they do, a reliable and succinct summary of the law, will probably be more acceptable to the reader than any notes which I might have endeavoured to write upon the subject.—J. B. M.

(*n*) *Bannatyne* v. *Bannatyne*, 2 Rob. 472; *Deare* v. *Elwyn*, 1 No. Cas. 342: *Mitchell* v. *Thomas*, 6 Moo. P. C. 137; *Wallis* v. *Maughan*, 1 No. Cas. 534: *Harwood* v. *Baker*, 3 Moo. P. C. 282; 50 R. R. 37.

(*o*) *Boyse* v. *Rossborough*, 6 H. L. C. 2, 49, 51; 26 L. J. Ch. 256.

free agency; and contrivances producing false impressions may be equivalent to positive fraud (*p*). Persuasion is not unlawful, but pressure which overpowers the volition, without convincing the judgment, constitutes undue influence, though force be neither used nor threatened (*q*). Natural influence may be lawfully exercised to obtain a will or legacy; and the rules of equity as to gifts *inter vivos* are not applicable to the making of wills (*r*).

Will procured by person benefited, suspicious.

A will written, or procured to be written, by a person who is benefited thereby, is not void; but the circumstance forms a just ground of suspicion, and unless clear and satisfactory proof be given that the document propounded expresses the wishes of the testator, it will be pronounced against (*s*).

Solicitor.

The circumstance of a solicitor preparing for a client a will containing dispositions in his own favour, does not prevent him from taking the benefit, if no undue influence is used (*t*).

---

(*p*) *Boyse* v. *Rossborough*, *ubi sup.*; *Wingrove* v. *Wingrove*, 11 P. D. 81; 55 L. J. P. 7; *Baudains* v. *Richardson*, '06, App. Cas. 169; 75 L. J. P. C. 57; 94 L. T. 290.

(*q*) *Hall* v. *Hall*, L. R. 1 P. & D. 481; 37 L. J. P. 40; 18 L. T. 152.

(*r*) *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; 41 L. J. P. 68; 27 L. T. 215. On the subject of undue influence in general, see the notes to *Huguenin* v. *Baseley*, in 2 Tud. L. C. Eq.; see also *Fowler* v. *Wyatt*, 24 Be. 237; *Scholefield* v. *Templer*, 5 Jur. N. S. 619; *Lyon* v. *Home*, L. R. 6 Eq. 655; 37 L. J. Ch. 674; 18 L. T. 451; *Kelly* v. *Thewles*, 2 Ir. Ch. Rep. 510.

(*s*) *Smith* v. *Shelton*, 9 Jur. 715; *Baker* v. *Batt*, 2 Moo. P. C. 317; 46 R. R. 52; *Harwood* v. *Baker*, 3 Moo. P. C. 282; 50 R. R. 37; *Stulz* v. *Schæffle*, 16 Jur. 909. And the rule throwing upon the party propounding a will, prepared by a person who takes a benefit under it, the burden of showing that the paper propounded expresses the true will of the deceased, is not confined to cases in which the will is prepared by a person taking a benefit under it, the true rule being that wherever a will is prepared under circumstances which raise the suspicion of the Court, it ought not to be pronounced for, unless the party propounding it adduces evidence which removes such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument, *Tyrrell* v. *Painton*, '94, P. 151; 70 L. T. 453.

(*t*) *Hindson* v. *Weatherill*, 5 D. M. & G. 301; *Barry* v. *Butlin*, 2 Moo. P. C. 480; 46 R. R. 123; *Butlin* v. *Barry*, 1 Cur. 614, 637; *Walker* v. *Smith*, 29 Be. 394; *Dufaur* v. *Croft*, 3 Moo. P. C. 136; *Waters* v. *Thorn*, 22 Be. 547.

Medical attendant. Guardian.

Wills made during illness in favour of medical attendants are viewed with great jealousy (*u*). As to the case of guardian and ward, see the remarks in *Hindson* v. *Weatherill* (*x*).

Fraud.

A will may also be impeached on the ground of fraud, but the Courts require strong evidence to show that a duly executed will is not the act of the testator, and that he was not aware of its provisions (*y*).

Duress.

Further, a will is invalid if procured from, and executed by, a testator under duress, whether it be duress of imprisonment or duress *per minas*. As to a testator acting under control equivalent to duress, see *Scouler* v. *Plowright* (*z*). Naturally, however, such cases are of rare occurrence; the same result being attainable, not so quickly or directly, but with smaller liability to defeat by the exercise of a less violent form of coercion, and by the insidious agency of influence and moral control. For an instance of a plea that a testator was prevented by force and threats from executing a new will, see *Betts* v. *Doughty* (*a*).

Capacity impaired by illness.

If a testator has given instructions for his will, and it is prepared in accordance with them, but illness prevents him, at the time of his executing the will, from recollecting anything beyond the fact of his having given instructions, but he believes that the will he is executing is in accordance with them, this limited capacity is sufficient to render the will valid. And this is so, although at the time of execution he had no longer the capacity to recollect and understand either the instructions he had previously given, or even each clause inserted in the will if it had been put to him (*b*).

---

(*u*) *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57; *Jones* v. *Goodrich*, 5 Moo. P. C. 16; *Reece* v. *Pressey*, 2 Jur. N. S. 380; *Ashwell* v. *Lomi*, L. R. 2 P. & D. 477; *Durnell* v. *Corfield*, 1 Rob. 51.

(*x*) 5 D. M. & G. 313.

(*y*) *Wrench* v. *Murray*, 3 Cur. 623; *Panton* v. *Williams*, 2 Cur. 530; *Scouler* v. *Plowright*, 10 Moo. P. C. 440.

(*z*) 10 Moo. P. C. 440.

(*a*) 5 P. D. 26; 48 L. J. P. 71; 41 L. T. 560.

(*b*) *Parker* v. *Felgate*, 8 P. D. 171; 52 L. J. P. 95; *Perera* v. *Perera*, '01, A. C. 354; 70 L. J. P. C. 46; 84 L. T. 371.

4. Persons born deaf and blind, consequently dumb (*c*), and, therefore, wholly destitute of the common organs of mental perception: for as "wisdom at one entrance quite shut out" may still find another inlet, or, once admitted, may remain, after all its natural ports are closed against new ideas, nothing short of the original co-existence of all these functional defects can produce legal incapacity (*d*); though, of course, the existence of any peculiarity in regard to the personal circumstances of the testator will dictate additional caution to his professional adviser, as, for instance, that of carefully reading and explaining the intended will to a blind testator. In all cases comprised under this head, the law proceeds, not upon any narrow technical ground, but on the absence of intellectual power adequate to form, and, by certain signs, to communicate, a rational volition; on the actual, and not the presumable, obscuration or disturbance of that higher faculty which ennobles and distinguishes man. As the inquiry must always be, whether the testator was of competent understanding or not, this head is virtually included under that which immediately precedes it. Persons born deaf and blind.

5. Persons outlawed; but outlawry in civil proceedings was abolished by 42 & 43 Vict. c. 59, s. 3. Outlaws.

By sect. 1 of 33 & 34 Vict. c. 23, it is enacted that from and after the passing of that Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat. Forfeiture consequent upon outlawry is not affected by this statute, and in this case the outlaw cannot make a will, there being nothing for it to operate upon. But in the other cases where forfeiture and escheat are abolished, there seems no obstacle to the making of a will (*e*).

---

(*c*) Dumbness is not, it seems, in the present state of science, a necessary consequence of congenital deafness, unless vision be also originally deficient. And see Co. Litt., 42 b, where it is said that a man deaf, dumb, and blind from his nativity hath not ability to enfeoffe.

(*d*) 1 Wms. Exors. 12.

(*e*) As to sect. 8 of this Act, which enacts that a convict cannot

II. As to the extent of the testamentary dominion.

II. But a far more bold and sweeping innovation consists in striking at the ancient requisite, as regards real estate, of ownership in the testator at the making of the will—a requisite peculiar to England, and according to Lord Coke founded on the "having" of the old Statutes of Wills (*f*), but, in fact, more remotely rooted in the "seisin" of the feudal law (*g*)—and by at once enlarging the testator's disposing power to the whole extent of embracing all his property, as well real as personal, whether acquired before or after the execution of the will (*h*). The power expressly includes interests under contingent and executory gifts of every kind, without regard to the fact whether the testator was or was not ascertained as the object of the gift; and even rights of entry, though not rights of action.

After-acquired property.

Rights of entry.

Estates not devisable.

On the other hand, this enactment is rightly confined to property, which, if left to be disposed of by law, would descend to or devolve upon the heir-at-law or customary heir, or the executor or administrator of the testator (*i*); in other words, to property which, if undisposed of by the deceased possessor, would follow the ordinary course of succession ordained by law, and be liable in the hands of the successors, as his real or personal representatives, to satisfy his debts and engagements generally (*k*); but an estate limited to heirs of the body, *i.e.* an estate tail, devolves under the peculiar protection of the legislature (*l*) in an extraordinary manner, and is not to be diverted from the course marked out on its creation, without the observance of certain appropriate forms prescribed by the same supreme authority. Tenants in tail, therefore, cannot dispose by

Estates tail.

---

alienate any property, see *Re Harris*, 19 Ch. D. 1; 51 L. J. Ch. 1; 45 L. T. 397.

(*f*) 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5; *Harwood* v. *Goodright*, Cowp. 90.

(*g*) Year Book, Michaelmas Terms, 39 Hen. 6, fol. 18, pl. 23.

(*h*) Sect. 3.

(*i*) Sect 3; and see sect. 1.

(*k*) As to escheat, see *ante*, p. 4; and see and consider 3 & 4 Will. 4, c. 106, s. 2.

(*l*) 13 Edw. 1, c. 1 (Statute de Donis Conditionàlibus).

will without barring the entail, for which, however, a cheap and easy method is now provided (*m*); but the devise of a tenant in tail would, if he should afterwards acquire the fee, be effectual. Still less can the testator, by his posthumous act, defeat a title commencing in his lifetime and consummated by his death. Hence, a joint-tenant, as such, cannot devise or bequeath; for the *jus accrescendi*, incident to that species of tenancy, vests at the instant of his death, and to treat the will as a severance would be to allow it the effect of a conveyance *inter vivos*; but if a joint-tenant, having made a will which but for the joint-tenancy, would pass the property, should, by severance, partition, or survivorship, become the owner in severalty of the whole or part, divided or undivided, his previous devise would, of course, be operative. In short, under the sweeping power conferred by the statute, a man, by his will, executed presently, may dispose of all that can, at his death, be justly denominated his own.

Estates in joint-tenancy.

It would follow from the above extension of the devising power, unaided by another enactment (*n*) to be presently noticed, that a general devise of real estate must have an operation commensurate, at least, with that which, under the old law, was peculiar to a general bequest of personal estate—the operation of passing whatever property falling within the terms of the gift may belong to the testator at his death. Thus, a devise of all the testator's lands, or of all his lands in a particular county, parish, or occupation, or held by a particular tenure, would draw to itself all future acquisitions of the given description from whatever source derived. This potency of a general devise may suggest the expediency, in some cases, of providing for the eventual acquisition of real estate by the testator, and in others, of cautiously restricting the devise to property already acquired.

Enlarged operation of a general devise

—suggests what cautions.

Copyhold and customary estates, to which the testator is

Copyhold and customary estates.

(*m*) 3 & 4 Will. 4, c. 74 (*England and Wales*); 4 & 5 Will. 4, c. 92 (*Ireland*).

(*n*) Sect. 24.

entitled as a devisee or surrenderee, but to which he has not been admitted, may now be devised without his previous or subsequent admittance (*o*). The statute embodies and amends the provisions of a former Act (*p*) for superseding the necessity of surrendering copyholds to the use of the will, so that now no surrender is needed to give effect to a devise of copyholds, or of any other species of customary estates (*q*), unless the surrender be, as it is in the case of a joint tenant or of a *feme covert*, something more than a formal requisite. But although a surrender to the use of the will is thus dispensed with, the Act still leaves the estate in the customary heir till the admittance of the devisee (*r*). The statute also confers a devising power on such copyhold and customary tenants as were before restrained by the particular custom from devising (*s*).

Estates *pur autre vie.*

Estates *pur autre vie*, as leases for the lives of others are technically called, which were first made devisable by the Statute of Frauds (s. 12), have likewise retained their former position (*t*); except that the extension of the devising power to interests which would have devolved to the heir (meaning, of course, the heir general), may be considered as impliedly denying the power of testamentary disposition to *quasi* tenants in tail of lands held *pur autre vie* (of which, as not being regularly entailable, entails were, and still are, barrable by an unenrolled (*u*) conveyance), and as having thereby finally disposed of any lingering doubt respecting the incompetency of such tenants to defeat the *quasi* entail by will (*x*).

This portion of the statute, which has given, expressly, to the testamentary power all the scope of which it appears to be fairly susceptible, must always be considered as the most valuable.

---

(*o*) Sect. 3; and see sects. 4, 5.

(*p*) 55 Geo. 3, c. 192.

(*q*) Sects. 3, 4, 5.

(*r*) *Garland* v. *Mead*, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179; 24 L. T. 421.

(*s*) Sect. 3.

(*t*) Sects. 3, 6.

(*u*) See note (*d*), Prec. X.

(*x*) See 1 Jarm. Wills, 60.

III. The exemption of testamentary appointments from the necessity of referring or alluding to the power, or its subject, or of otherwise indicating, expressly or constructively, an intention to appoint by virtue of a power as distinguished from an intention to devise or bequeath by force of an interest, may also be considered as extending the range of testamentary dominion, while it extinguishes a prolific source of litigation; for the distinction was too refined to be appreciated by ordinary testators, and many a testamentary appointment, therefore, either failed, or was capable of being supported only by extrinsic evidence. But now a gift, in general terms, acts indifferently upon ownerships and testamentary powers (*y*), whether the power was created before or after the statute came into operation, unless the power be confined to specific objects (*z*), whether individuals or classes (as in the instance of a power to appoint in favour of A., or in favour of the "children" of A.), and then there must still be a reference to the power, or some equivalent denotation of the intention to exercise it.

III. As to the exercise of testamentary powers of appointment—

—by a general devise or bequest.

It should seem that the operation of a general gift upon general testamentary powers must be determined by analogy to its effect upon after-acquired property, strictly such; and that, consequently, where a general power of appointment is given to the survivor of A. and B., the power would be well exercised by a general devise or bequest contained in the will of A., though made in B.'s lifetime, if the testator, by surviving B., should eventually become the donee of the power (*a*); and that principle has been held to extend to the case of a general power given to the testator by an instrument not in existence at the making of his will (*b*), and to the case of a general equitable testamentary power given to the survivor of A. and B., which has been held to be well exercised by the will of A., a married woman, executed during coverture in the lifetime of B., whom A. survived (*c*).

After-acquired general powers.

---

(*y*) Sect. 27.
(*a*) Sects. 3, 24, 27.
(*c*) *Ante*, pp. 68, 69.
(*z*) See *ante*, p. 69.
(*b*) *Ante*, p. 68.

IV. As to the execution and attestation of wills.

State of the old law.

IV. While the old law studiously guarded devises of freehold estates, by prescribing certain formalities of execution and attestation (*d*), it was altogether indifferent, on these points, as to bequests of personal estate and devises of copyhold property. There were two objects, therefore, to be accomplished: first, to render the law, in this respect, uniform; secondly, to render it simple and certain.

The present requisites.

The statute 1 Vict. c. 26, s. 9, requires that wills of every description, except wills of personal estate made by soldiers in actual service and by mariners or seamen at sea (*e*), shall be signed at the foot or end of the instrument by the testator or some person in his presence and by his direction: which signature is to be made, or acknowledged, before two or more witnesses, who are to be present at the same time, and are to attest and to subscribe the will in the presence of the testator; but the concluding member of the section declares that no form of attestation shall be necessary. The terms in which these essential ceremonies—ceremonies to be observed by all—are enacted, were but ill-adapted to convey the requisite information, promptly and clearly, to either the professional or the popular mind. The litigation upon the 9th section became frequent and serious. Many wills were declared invalid for want of a literal compliance with the terms of the Act, especially with regard to the position of the testator's signature at the "foot or end" of the will. The legislature again interposed, and by the Act 15 & 16 Vict. c. 24 provided for many of the particular cases in which wills had been held to be imperfectly executed under the 9th section. We proceed to indicate, as briefly and distinctly as may be, those ceremonies attending the execution of a will, which a safe exposition of the two statutes taken together, and a due regard to the authentication of the instrument, and to the rights of property, seem to enjoin or strongly recommend.

1. Signing by, or for, the testator.

1. The testator should sign his name in his usual form and manner underneath the last line of the will; and his signing must precede that of the witnesses, for if the witnesses, or either of them, sign before the testator, the execution is bad.

(*d*) 29 Car. 2, c. 3, s. 5. (*e*) See notes to sect. 11.

The testator, if unable to write his name, should cause some person, in his presence, so to sign his (the testator's) name; for though a mark, but not a seal, would *do*, yet, at this day, a mark is a very rude and unauthentic mode of signing. If it can be avoided, though there are no words in the statute on which any legal objection can be founded, the person procured to sign for the testator should not be also one of the witnesses.

2. Where the will has been signed in the absence of the witness either by or by the direction of the testator, he should audibly acknowledge to the witnesses,—for though constructive acknowledgment may be sufficient, and, in particular cases, as that of a dumb testator, more could not reasonably be required, still an express acknowledgment is to be preferred—that the signature was made by him, or, as the case may be, by a designated individual in his presence and by his direction; and even where the act of signing is performed in the presence of the witnesses, it will be proper that their attention should be particularly directed to the signature. But if the will consist of several sheets—though for greater certainty, and to prevent interpolation, each should be signed at the foot—it is not absolutely necessary to sign, or to acknowledge the signing of, any other than the last sheet in the presence of the witnesses.

2. Acknowledgment, by the testator, of a previous signature.

3. Though it is not essential that either the person, if any, who signs for the testator, or the witnesses, should have the slightest knowledge of the nature of the document—for even while publication, now expressly abolished (*f*), was a legal though an empty sound, the testator might have been silent if not deceptive upon that point—yet, unless there be some strong motive for concealment, the testator will do well to declare that the document is his will, or, as the case may be, a codicil to his will. It is desirable that the several sheets, if more than one, composing the will, should be attached, or, at least, be present together at the time of execution.

3. Disclosure of the character of the instrument.

4. The witnesses must be two (or more) in number, and must be simultaneously present, when the signature by or

4. Presence, and subscription, of the witnesses.

(*f*) Sect. 13.

for the testator, or his acknowledgment, is made; the testator and the witnesses should be within sight and hearing of each other; and although the statute does not say that the witnesses shall subscribe at the same time, or in the presence of each other, as well as of the testator, the three should not separate till the witnesses have both subscribed. Such subscription, which must be in the witness's own handwriting, should contain his name written in his usual form and manner—though a mark, which, as we have seen, even in the case of the testator, satisfies the statute, would be a sufficient subscription by a witness, and initials are enough—also his abode and quality. The witnesses are required to attest, as well as to subscribe. By the attestation here contemplated must be understood that mental observation which enables men to testify concerning matters transacted before them; for the notion, founded on a misconstruction of a subsequent provision of the statute, that the solemnity of attesting may now be fulfilled by corporeal presence alone, has been too hastily adopted. With respect to the number of witnesses, the statute has fixed no maximum. The place of residence and the occupation of each witness should be appended to his name, to facilitate his discovery in case the will has to be proved *per testes*.

5. Memorandum of attestation.

5. An attestation clause is not necessary. Such is conceived, at least, to be the true result of this somewhat obscure section (*g*), made darker by the last explanatory adjunct. But a formal memorandum should always be added in order to facilitate probate, which would not otherwise be granted without a special affidavit; to afford evidence of title to the property devised; for a purchaser would otherwise require a statutory declaration (*h*) by the witnesses; and lastly, to fix the attention of the witnesses upon the facts which it is expedient that they should certify, and which, having thus certified, they could not afterwards so effectually deny. This clause should express that the instrument has been signed—not, as heretofore, "signed and published," for no publication is requisite (*i*)—by the testator (or, as the case

(*g*) Sect. 9. (*h*) 5 & 6 Will. 4, c. 62. (*i*) Sect. 13.

may be, signed by a designated individual, in the testator's presence and by his direction), as the last will of the testator, in the presence of the witnesses, present at the same time; also, that the witnesses have subscribed in his sight and presence—so far the memorandum would record matters which are of the very essence of the execution—and (it may be well to add) in the presence of each other. At the foot of this memorandum, and not elsewhere, the witnesses, having first perused it, should sign as directed under the preceding head.

6. Selection of the witnesses.

6. As witnesses, being either objects, or married to objects, of the testator's bounty, absolutely forfeit, by the act of subscribing, the benefits intended for them, they are, of course, improper, though sufficient (*k*) witnesses; and the persons selected for such a duty should, as will naturally occur, be intelligent, as well as indifferent, persons (*l*).

7. Universality and inflexibility of the statutory requisites.

7. ALL testamentary papers, without exception (*m*), must be executed and attested in the manner prescribed by the statute, and its provisions cannot be evaded, even by means of a power created for the purpose. In preparing testamentary appointments, it was formerly the practice to consult the power as to the requisites of execution and attestation; but equity (always prone when legal fetters annoy its jurisdiction to erect itself into a court of repeal) aided in favour of particular claimants the neglect of that form which the power had prescribed (*n*). But now the statute is the sole, universal, and inexorable guide; nothing additional can be imposed, nothing there enjoined can be dispensed with, no inadvertence can ever be helped. Therefore, testamentary appointments must be executed and attested according to the statute, and should be executed and attested without regard to the power, whether the power were created before or after the statute came into operation; and clauses which confer testamentary powers should either be wholly silent

Testamentary appointments.

(*k*) Sect. 15.

(*l*) 1 Hayes, Conv. 363.

(*m*) Other than wills made by soldiers on active service or by mariners at sea.

(*n*) Sugd. Pow. ch. xi.

in regard to execution and attestation, or simply refer to the statute.

V. As to the revocation and alteration of wills.

V. We now proceed to the revocation and the alteration of wills. These also are placed on a new basis; for not only is a revoking will, whether of real or of personal estate, subjected to the same regulations, in regard to execution and attestation, as a disposing will (*o*), but other important changes are introduced.

Revocation by marriage.

Thus, the mere marriage of a testator produces a total revocation (*p*)—except of testamentary appointments in cases where the property would not, in default of appointment, go to the testator's heir, executor, administrator, or statutory next of kin—without the additional circumstance, formerly requisite, of the birth of a child; so that, in this respect, the will of a man is placed on the same footing as that on which the will of a woman formerly stood, and, indeed, still stands. The language of this enactment, it will be observed, is absolute; and, therefore, the revocation would not be prevented by the strongest declaration of the testator that his will shall, notwithstanding any future or even an actually contemplated marriage, continue in force. It is easy to suppose that cases may occur in which the testator's intention would not be altered by the change of his condition; as where he has made a disposition in favour of his family by a deceased wife, and contracts marriage again with a woman for whom he has amply provided by a jointure, and by whom there is not any moral chance of his having issue. The undistinguishing operation of this enactment, by which on the marriage of every person, male or female, under any circumstances, his or her will is reduced to waste paper, should be generally known.

Change of circumstances.

But as the statute abolishes revocation on the ground of a presumed intention from an alteration of circumstances (*q*), marriage is now the only extrinsic circumstance capable of working a revocation.

---

(*o*) Sects. 20, 21 and 22.

(*p*) Sect. 18.

(*q*) Sect. 19.

The statute also abolishes revocation by means of a conveyance (*r*), except so far as the conveyance, by substantially aliening the property, withdraws it from the testator's control. A devise, therefore, unless specially restricted, will operate on whatever interest the testator may have in the property at his death, notwithstanding any new modification or partial alienation of his ownership, which may have taken place subsequently to the execution of the will. The constructive revocation of devises, by the execution of conveyances designed only to create a charge upon the estate or to effect some other limited purpose, but stretched by technical reasoning far beyond the intention, often produced injustice (*s*). New modification of estate.

Under the old law, a will might have been revoked by burning, tearing, cancelling, or obliterating, without the presence or attestation of any witness; proof or presumption that the act was that of the testator sufficed. The statute, however, makes this important distinction between the act of burning, tearing, or otherwise destroying the substance of the will, and a mere obliteration of its contents:—it allows the former acts, if done *animo revocandi*, still to have a revoking effect, though unattested and unseen by any witness (*t*); while any obliteration, whether of the whole or part only of the will, as well as an interlineation, is required to be executed and attested with the same solemnity as an original will (*u*), except that (and here the legislature must be allowed to speak its own peculiar language) "the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator, and the subscription of the witnesses, be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." Destruction of the instrument. Obliteration and interlineations.

It is important to bear in mind the fact that this statute does not, like the former law (*x*), admit of the revocation of Cancellation.

(*r*) Sect. 23.
(*s*) 1 Jarm. Wills, ch. 7, sects. 13 and 14.
(*t*) Sect. 20. (*u*) Sect. 21.
(*x*) 29 Car. 2, c. 3 (Statute of Frauds).

a will by cancellation, without more; and, therefore, if a testator, meaning to annul his will, should draw his pen across the sheets, or through his signature, or have recourse to any other mode of defacing the writing, still the instrument, so far as its contents might yet be discernible, would remain in full force as his will, unless such cancellation were executed and attested as the statute requires in the case of a will.

Revival of revoked wills.

Before we close this head, attention should be particularly pointed to the circumstance, that the revival of a revoked will, whether revoked before or after the statute came into operation, can be effected only by re-execution, or by a codicil expressive of an intention to revive the will.

VI. As to the lapse of devises and bequests.

VI. Considerable alterations have been made in the doctrine of lapse. Lapse is the failure of a testamentary gift by the death of its object in the lifetime of the testator. Where the interest given is circumscribed by the life of the deceased devisee or legatee, or depends upon a circumstance which is personal to him and which has not occurred (as his attainment of the age of twenty-one), the gift necessarily fails; and though the interest should be capable of transmission to his representatives, yet, as it never vested in him, his heirs, executors, or administrators could take it only by force of special words of substitution. If the whole and absolute interest was given, then, under the old law, the death of the devisee or legatee caused an intestacy as to the subject of the lapsed gift, unless it were personal property and the will also contained a residuary bequest; if less than the whole and absolute interest was given, then the expectant dispositions, if any, were accelerated. Thus, if Blackacre was devised to A., who died before the testator, in fee, and the residue of the real estate was devised to B., Blackacre did not fall into the residue, but descended to the testator's heir: while, if a lease for years, or any other subject of personal estate, was bequeathed to A., who died before the testator, and the residue of the personal estate was bequeathed to B., the subject of the lapsed bequest fell into and passed as part of the residue to B. But if real or

Old law.

personal estate was given to A, who died before the testator, for the life of B., and, on the death of B., to C., then the remainder to C. took effect immediately on the testator's death (and, unless the case were within the provisions about to be noticed as to children and issue of the testator dying in his lifetime, would still take effect) as an immediate gift in possession, notwithstanding B. should survive the testator. So, if Blackacre was devised to A., who died before the testator, in tail, and on failure of his issue to B., the devise to B. took effect presently, notwithstanding A. left issue who survived the testator. Such was the general state of the law, which has been altered as to real estate, by enlarging the operation of a residuary devise, and by carrying out the intended effect of a devise in tail; and, as to both real and personal estate, by attributing new force to gifts in favour of the testator's children or his more remote issue.

Lapsed and void devises, present law.

Under the present law, if a devisee in fee of specific lands die in the testator's lifetime, the estate comprised in such lapsed devise, instead of devolving on the heir, passes to the residuary devisee (*y*); and so, generally, the property or interest comprised in every devise, lapsing or incapable of effect from any cause whatever, falls into the residue of the realty. The result of this alteration, taken in connection with the extension, already noticed, of the disposing power to after-acquired lands (*z*), is, that a testator, whose will contains a complete and operative general or residuary devise in fee, cannot die intestate in regard to any portion of his real estate. Hence there can no longer be any occasion for a subsequent adoption or recognition of the will, in order to extend the operation of a general or of a residuary devise to real estate bought or otherwise acquired since the execution of the will, or comprised in any devise which has lapsed by the death of a devisee in fee.

Devises in tail of realty.

The other alterations in the doctrine of lapse are confined to particular cases. The devise for an estate tail in realty to any person dying in the testator's lifetime is made to take effect if any issue in tail be living at the time of the testator's

(*y*) Sect. 25. (*z*) Sect. 3.

death (*a*), [but section 32 does not substitute the issue of the intended taker for the deceased, but makes the subject of the gift the property of the intended taker, and as such it passes under his will, or descends as upon his death intestate immediately after the death of the testator (*b*)].

Devises and bequests to the testator's issue.

The remaining enactment, under this head, provides, that an interest in real or personal estate, given to a child or other issue of the testator himself, dying in the lifetime of the testator, leaving issue, shall, if any such issue—and the word *such* does not necessarily refer to the *very* issue left by the deceased devisee or legatee (*c*)—should survive the testator, not lapse, but belong to the representatives of the child or other issue to whom the devise or bequest purports to be made, as part of his or her own real or personal estate (*d*); and, as such, it will be subject, of course, to the testamentary disposition, if any, of the same child or issue—provided, as to real estate, the will of the child or issue be within the statute, and consequently of force to pass after-acquired real estate—notwithstanding that such disposition may have the effect of wholly excluding the issue required, by this enactment, to be living at the death of the testator. Of course, where the will itself disposes prospectively, in the event which has happened, of the interest of the deceased child or issue, the operation of the statutory provision is excluded.

Effect of the rules as to lapse.

In both the preceding cases, of the gift in tail, and of the gift to a child or other issue of the testator, the statute places the persons claiming under the intended devisee or legatee in the same situation as if such devisee or legatee,

---

(*a*) Sect. 32.

(*b*) See p. 77. The passage within brackets is very ill expressed. Where an estate tail is devised to a person who dies before the testator, leaving issue, such estate tail is of course not devisable by the will of such person. The estate tail will pass to the issue as if the devisee had died immediately after the testator. The passage within brackets would have been appropriate to sect. 33, but, as applied to sect. 32, appears to be misconceived.—J. B. M.

(*c*) See p. 78.

(*d*) Sect. 33.

instead of dying before, had died immediately after the testator.

But neither of the provisions in question can apply where the requisite of surviving the testator is involved in the very description of the objects, and where, consequently, nothing can lapse by the death of an individual in his lifetime, as in the case of a gift to "sons," "daughters," "children," or "grandchildren," as a class, for there, according to the established rules of construction, sons, daughters, children, or grandchildren dying before the testator, would be considered as not originally within the contemplation of the gift (*e*). It follows, therefore, that where a testator gives his property to a class (for example, to his children equally), and wishes that in case of the death of any child, his or her children (*i.e.* the testator's grandchildren) should be substituted, there should be inserted express words under which the grandchildren would take by substitution; otherwise any child dying in the testator's lifetime would never come within the class, and would consequently take nothing. But where a testator gives property to his children *nominatim*, and one dies in his lifetime (*f*), the subject-matter of the gift will form part of the estate of the deceased child, subject to the dispositions of his will and to his debts.

Their inapplicability where the gift is to a class.

VII. We now approach the most questionable part of the statute, the construction clauses (*g*): questionable, both as regards the general expediency of legislating on such subjects, and as regards the frame of these clauses in particular.

VII. As to the construction of wills.

The policy of legislating on such matters questioned.

(*e*) In such cases, if the testator, by a codicil, revokes the gift as to one member of the class, the others take the whole, *Shaw* v. *M'Mahon*, 4 Dr. & War. 431; 65 R. R. 724; *Boulcott* v. *Boulcott*, 2 Drew. 25; 100 R. R. 13; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; 13 L. T. 393; *In re Palmer*, '93, 3 Ch. 369; 62 L. J. Ch. 988; 69 L. T. 477, overruling *Humble* v. *Shore*, 7 Hare, 247; 33 L. J. Ch. 188, n.; 82 R. R. 95. See also *In re Parker*, '01, 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116; *In re Allan*, '03, 1 Ch. 276; 72 L. J. Ch. 159; 88 L. T. 246; *In re Wand*, '07, 1 Ch. 391; 76 L. J. Ch. 253; 96 L. T. 425; *In re Dunster*, '09, 1 Ch. 103; 78 L. J. Ch. 138; 99 L. T. 921.

(*f*) Leaving issue who survive the testator.

(*g*) Sects. 29, 30, 31.

An Act of Parliament is but a blind expositor of legal instruments—objects too minute for its comprehensive vision; and the interpreting, for all future testators, of a few phrases, gleaned from bygone cases of ignorance and mistake, seems not less unbecoming the dignity than it is foreign to the functions of a great legislative body. In framing documents, for which the legislature has evinced such critical anxiety, we shall be apt either to lose sight of the enacted signification, or to be perplexed between our preconceived notions of the force of a word and its statutory sense. Happily, this interference with the rules of construction is limited to a few instances. The conflict of legal doctrines with popular opinion, on one or two of the questions of construction to which this branch of the statute extends, was certainly to be deprecated not only because the rule of law often disappointed the intention, but because the conviction that it did so produced in judges a strong disposition to find some plausible excuse for departing from the strict construction. Hence arose the numerous cases in which devises, without words of limitation, were held to pass the fee, when combined with circumstances affording an inference that the testator meant to give a larger interest than an estate for life, as the use of the word "estate," the imposition of a charge on the devisee, or the introduction of a devise over in the event of the prior devisee dying under age. Hence, too, arose the cases, almost as numerous, in which the question was, whether, in the construction of gifts to take effect on the failure of issue, indefinitely, of a given person, the words referring to the failure of issue were, by force of the context, restrained to import a leaving of issue at the death of that person, or at some other period within the limits of the rule against perpetuities.

Grounds of complaint against the old law.

The rule (*h*) that a general devise did not pass leaseholds for years where there were freeholds to satisfy it is abolished (*i*). The enactment extends to copyholds, but unnecessarily; it having been held that since the statute which dispensed with a surrender to the use of the

General devise passes leaseholds and copyholds.

(*h*) *Rose* v. *Bartlett*, Cro. Car. 293. (*i*) Sect. 26.

will (*k*), copyholds would pass under a general devise (*l*), as they would have done before that statute when preceded by such a surrender.

Indefinite devise passes the fee.

The rule which required that an intention to give to a devisee an estate in fee, as distinguished from an estate for life, should be indicated by words of limitation, or by some equivalent expression, is likewise abolished; so that now a devise of a "messuage" or a "close of land" to J. S., without more, will pass the fee, unless a contrary intention appear (*m*).

Construction of words importing a failure of issue.

The statute also provides that words referring to a failure of issue shall, unless the context requires a different construction, be held to import a failure of issue at the death, and not, as formerly, a failure of issue at any the remotest period (*n*). The effect of this statutory modification of the rule may be illustrated, in regard to both real and personal estate, by the simple case of a gift of real and personal estate to A., and if he shall die without issue, then to B. in fee; here, supposing the will to have been made before the 1st of January, 1838, when the statute came into operation, A. would take (the words "without issue" being construed, according to the old law, to import an indefinite failure of issue) an estate tail in the real estate (*o*), with remainder to B. in fee, while the whole interest in the personal estate (which is incapable of an entail) would belong to A. absolutely (*p*). Whether, therefore, A. had any issue or not, the gift to B. would fail, as regards the personal estate; and it might by the act of A., *i.e.* his enrolled conveyance (*q*), be defeated, as regards the real estate. If, however, the gift in question occurred in a will made on or after the 1st of January, 1838, then (the words "without issue" being construed, according to the present law, to refer to a leaving of issue at the death), A. would take the fee of the real

Old law.

Present law.

---

(*k*) 55 Geo. 3, c. 192.
(*l*) *Doe* v. *Ludlam*, 7. Bing. 275.
(*m*) Sect. 28.
(*n*) Sect. 29.
(*o*) *Doe* v. *Ellis*, 9 Ea. 382.
(*p*) *Donn* v. *Penny*, 19 Ves. 545; 13 R. R. 255.
(*q*) 3 & 4 Will. 4, c. 74 (*England and Wales*), 4 & 5 Will. 4, c. 92 (*Ireland*).

estate, and the whole interest in the personal estate, but defeasible, as to both, by his dying without leaving issue living at his death, in which event B. would become entitled by way of executory devise or executory bequest, notwithstanding any act of A.

Construction of devises to trustees.

The provisions for ascertaining the effect of devises to trustees (*r*) are of a purely technical character. They were intended to relieve the expositors of wills from a most embarrassing portion of their duty. The doctrine that no greater quantity of legal estate should be taken by trustees, under an indefinite devise, than was sufficient for the purposes of the trust, though bearing *primâ facie* the appearance of reason, rendered it nearly impossible to say, without a judicial decision, what quantity or quality of legal estate was, in certain cases, actually vested in them; and though in some of the reported cases it may have been decided negatively, that the whole fee was not vested in the trustees, yet it would be difficult to express, by any technical phrase, what precise estate they were considered to have taken. The difficulty is now transferred to the statute-book.

Operation of the Act upon specific devises and bequests.

As the enactment which makes testamentary dispositions speak and take effect, with respect to the property (not to the objects) comprised in them, as if the will were actually executed the instant before the death of the testator (*s*), was hardly requisite to complete the dominion over after-acquired property, both real and personal estate having been already placed (*t*) on that liberal footing whereon personal estate alone formerly stood, this enactment may be considered as having, for the most part, a distinct object, and as designed to communicate a novel effect to one species of gift, namely, specific devises and bequests, at which it seems to be tacitly aimed. Cases sometimes occurred, under the old law, in which, between the date of the will and the death of the

(*r*) Sects. 30, 31. Having regard to the period of time which has elapsed since the Wills Act came into operation, I have not thought it worth while to retain the references to cases upon wills made before 1838, which appeared in this place in the 10th and previous editions. — J. B. M.

(*s*) Sect. 24.

(*t*) Sect. 3.

testator, the identical subject of a specific bequest had been removed or destroyed, but other property, equally answering the description, had been substituted. In such a case, without republication of the will, the legatee would not, under the old law, have been entitled to the substituted property (*u*), but he will take it by the operation of the present Act unless a contrary intention appears. If the very subject of property should be gone, but the testator should have, at the time of his death, another subject to which the words apply, that subject will pass: the statute imputing to the testator an intention to make this new application of his words, unless he manifests a contrary intention on the face of the will. A testator, intending that a specific gift shall pass no other subject of property than that which answers the description at the execution of the will, should make such his intention apparent.

As to the effect of the present law with regard to the forms of wills.

In these accessions to the testamentary power and changes in the rules of construction, however important, there is nothing to excite apprehension in the mind of the draftsman, lest, by essentially affecting the forms of wills, they should oblige him to unlearn the old and acquire a new testamentary language. These rules of construction may, on the one hand, dictate caution in regard to the intended scope of general as well as of specific devises and bequests; and, on the other hand, induce the framers of wills either to withdraw their attention from some points which used formerly to exercise it (such, for instance, as the expressing, in general or residuary devises or bequests, of an intention to exercise general powers of appointment; the mention of leaseholds in a general or residuary devise, intended to comprise lands of that tenure; and the insertion of words of limitation in devises intended to pass the fee), or to direct their attention to those points from other motives or for other purposes. As, under the present law, the consequence of silence, in these instances, is to pass the subject of the power, the leaseholds, or the fee, a contrary intention, if entertained, should be distinctly expressed. And it is always to be remembered,

(*u*) 1 Rop. Leg. 179.

that the context of the will may raise an argument for excluding the application of the rules of construction propounded by the legislature. A testator's meaning and intentions are to be gathered from the whole of his will taken together, and those intentions will be carried out by the Court, even though some expressions have to be discarded or modified, and others to be supplied by implication (*x*). And in order to determine a testator's meaning, the Court must read his language in the sense which he himself appears to have attached to it; with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator, by his will, has beyond all doubt excluded such construction (*x*).

Testator's meaning to be gathered from the will as a whole.

Scotland and colonies not within the statute.

The statute expressly excludes Scotland from its purview (*y*); and, by the general law, such of our colonial dependencies as have not imported or adopted the statute, either generally as part of the laws of England, or specially, are also unaffected by its operation.

*Donatio mortis causâ.*

The statute does not apply to a *donatio mortis causâ* (*z*). But where the circumstances indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a *donatio mortis causâ* will not be presumed (*a*).

These observations do not profess to exhaust the subject. They purposely leave many points of secondary interest wholly untouched. But they exhibit (or they have failed of

---

(*x*) *Towns* v. *Wentworth*, 11 Moo. P. C. 526. See also *In re Cheadle*, '00, 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297.

(*y*) Sect. 35.

(*z*) 1 Rop. Leg. ch. 1; *Moore* v. *Darton*, 4 De G. & S. 517.

(*a*) *In re Patterson*, 12 W. R. 941; 51 L. J. Ch. 1. See also the notes to *Ward* v. *Turner*, 2 Ves. S. 431, in 1 Wh. & Tud. L. C. Eq.; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; 37 L. J. Ch. 633; *Beak* v. *Beak*, L. R. 13 Eq. 489; 41 L. J. Ch. 470; *Moore* v. *Moore*, L. R. 18 Eq. 474; 43 L. J. Ch. 617; 30 L. T. 752; *Rolls* v. *Pearce*, 5 Ch. D. 730; 46 L. J. Ch. 791; 36 L. T. 438; *Austin* v. *Mead*, 15 Ch. D. 651; 50 L. J. Ch. 30; 43 L. T. 117; *Treasury Solicitor* v. *Lewis*, '00, 2 Ch. 812; 69 L. J. Ch. 833; 83 L. T. 139.

their object) the broad features of the law—much less, indeed, than it behoves the professional adviser to learn and meditate, but all, or nearly all, that it concerns the general reader, and even the general practitioner, to know.

We may now close, not unprofitably, we trust, our view of this statute, by suggesting that testators should reconsider their wills, from time to time, as important changes affect the state of their property or the objects of their bounty, and rather endeavour to provide for events as they arise, than rely on the prospective care either of themselves or of the legislature; by deprecating, as more or less perilous, all attempts to engraft alterations of intention on previous testamentary papers, whether by interlineation or obliteration or by codicil, and all attempts to incorporate, by reference, the contents of ledgers, journals, or other detached writings; by cautioning both testators and their advisers against the too confident assumption of the responsible, morally responsible, office of a will-maker, in cases of magnitude and difficulty, which often try the gravest experience; by urging upon unprofessional persons the good sense, duty, and economy of taking regular advice, in a matter that involves, perhaps, all their hard-earned gains, all their tenderest affections—nor less upon professional men, who may have acquired some repute by framing or advising on the wills of others, the folly of jeopardising it by making their own (*b*); and (if we may

(*b*) See *Medlycott* v. *Jortin*, 2 Br. & B. 632; a case upon Mr. Serjeant Hill's will, which was so singularly confused, that, but for the respect due to the very learned Serjeant, it might, not unreasonably, have been held void for uncertainty. The will of Sir Samuel Romilly was also inartificially penned, and that of Chief Baron Thompson was the subject of Chancery proceedings. So also were the wills of Holt, C.J., Viner's Ab., *Apportionment*, p. 18; Eyre, C.J., *Gower* v. *Eyre*, G. Coop. 156; Mr. Serjeant Maynard, *Earl of Stamford* v. *Sir John Hobart*, 3 Br. P. 31; Vernon, the eminent Chancery Counsel, *Acherley* v. *Vernon*, 1 P. W. 783; 3 Br. P. C. 85; Mr. Baron Wood, *Baker* v. *Bayldon*, 31 Be. 209; Mr. Justice Vaughan, *Knight* v. *St. John*, *coram* Wood, V.-C., 1862; Francis Vesey, Jun., the reporter, *Vesey* v. *Vesey*, *coram* Kindersley, V.-C., 1862; Richard Preston, the conveyancer, *Whyte* v. *Preston*, *coram* M.R., 1862; Lord Chancellor Westbury, *Bethell* v. *Abraham*, L. R.

be allowed to mingle, yet further, morals with our law) by condemning all whimsical, ostentatious, and splenetic schemes of disposition,—the singularity which departs from ordinary and approved modes where nothing peculiar exists; the vanity which, regardless of near and known connections, provides for remote generations a vast estate and an obscure name (*c*); the charity which reserves itself for posthumous admiration; resentments that sleep not in the grave; finally, addressing to all who have disposable property this admonition—to settle their affairs at leisure and in health, while there is yet a sound mind in a sound body, that so they may die, not only testate but advisedly justly and wisely testate.

---

17 Eq. 24; 43 L. J. Ch. 180; 29 L. T. 715; Lord Chancellor Cottenham, *Cottenham* v. *Pepys*, *coram* M.R., 1881; and Mr. Baron Cleasby, *Cleasby* v. *Cleasby*, *coram* Hall, V.-C., 1881. Saunders, C.J., appears to have made a speculative devise, upon the validity of which his executors, Maynard, Holt, and Pollexfen, all great lawyers, were divided in opinion (4 R. P. Com. Rep. App. 24). The will of Bradley, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty (Martin's Conv. Recital Book, 35, n.). And a late learned Master in Chancery directed the proceeds of his estate to be invested in Consols *in his own name*.

(*c*) The most remarkable modern instances are afforded by the wills of *Thellusson* (see *Thellusson* v. *Woodford*, 4 Ves. 227; 4 R. R. 205; 11 Ves. 112; 8 R. R. 104; *Oddie* v. *Woodford*, 3 M. & C. 584; 45 R. R. 331; *Thellusson* v. *Robarts*, 5 Jur. N. S. 1031; *Thellusson* v. *Rendlesham*, 7 H. L. C. 429; 28 L. J. Ch. 948) and *Bengough* (*Bengough* v. *Edridge*, 1 Sim. 173; *Cadell* v. *Palmer*, 10 Bing. 140; 7 Bli. N. S. 200). With respect to Thellusson's scheme, the enormous accumulation once anticipated, which seemed almost to threaten the equipoise of the State, vanished in chancery management, &c.; and as Parliament had interposed by a Public Act (39 & 40 Geo. 3, c. 98), to limit accumulation, so it interposed by a private Act (3 & 4 Will. 4, c. xxvii.) to correct, in some degree, the particular mischief. Bengough's will, which was settled by the late Mr. Preston, and contained directions for a funeral with civic honours and a costly monument, was established after a vigorous contest, by a judgment of the House of Lords (7 Bli. N. S. 202).

# SUGGESTIONS

TO

# PERSONS TAKING INSTRUCTIONS FOR AND PREPARING WILLS.

OF all the duties which devolve upon the legal practitioner, none, perhaps, so imperatively demands the exercise of a wise discrimination as that of taking instructions for and preparing a will. Intending testators too often postpone the testamentary act until they are prevented by disease or physical weakness from explaining in detail to their professional adviser the situation of themselves, their family, and their property, and to the discretion of that adviser the particular provisions of the instrument are left. Indeed, many persons are ignorant of the ordinary modes of disposition under similar circumstances of family and property, and require to be advised as to the plan best adapted to those circumstances; and he who would efficiently discharge this important branch of a lawyer's duty should be prepared with some sound and well-considered notions on the subject. This perhaps will be facilitated by suggesting some of the particulars on which accurate information should be obtained in taking instructions for a will, and by pointing out briefly the comparative advantages of the several modes of testamentary disposition adapted to ordinary circumstances.

It is obvious that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the intending testator. It is equally obvious that on the part of the latter there should be that full confidence which induces him to explain his position to his professional adviser without concealment and without reserve.

In the course of a judgment in a recent will case (*d*), the

(*d*) *In re Wait*, 30 Ch. D. 622; 54 L. J. Ch. 1172; 53 L. T. 336.

late Mr. Justice Pearson said: "I cannot part with the case without expressing an opinion which I have entertained for a great many years (and which the experience of the last three weeks in this Court has most strongly confirmed), that I regret exceedingly that not only ordinary laymen, but, as it seems to me, professional men, do not understand the great difficulty there is in drawing wills, and do not bestow a little more care and pains in endeavouring to draw them in such a way as that the numerous questions which often arise on them should be avoided. I regret to say that these questions often throw a great deal of expense on parties interested under the wills, and are the cause of great heart-burnings and most bitter animosities. . . . Very often a will is most carefully drawn, so far as the phraseology goes, but either the person who draws it is improperly instructed, or in some other way a mistake is made which creates difficulty and worse than difficulty. During the last three weeks I have disposed of not less than thirty will cases in which questions have arisen through some mistake."

Instructions, from whom to be taken.

1. Instructions for a will should, if possible, be taken from the testator himself, rather than from third persons, especially where such persons are interested.

Inquiries as to matters personal to the testator.

2. Full inquiry should be made as to the personal position of the testator himself, of his family, and of the objects of his bounty.

Is the testator legitimate or illegitimate? Is he married or unmarried? If married, when? and was a marriage settlement executed? Is there any doubt of the fact or of the legality of his marriage? or of the legitimacy of any of his children or other objects of his favour? Is there a probability of the birth of other children? Is there any question as to the place of domicile of the testator, or of any of the objects of his bounty? Is the testator engaged in trade? in partnership either in his general business, or in a particular adventure?

Nature and extent of testator's property.

3. Full inquiry should be made as to the nature and extent of the testator's property.

Where is the realty (if any) situate? Is it freehold, leasehold, or copyhold? What is the precise interest of the

testator therein? and how did he acquire it? Is any of it mortgaged? Has the testator contracted to sell or buy any real estate? Is any of the realty to be specifically devised? Are the rents current at the testator's death to be apportioned or to belong wholly to the devisee? Has the testator any powers of appointment? Is any provision to be made for carrying on his trade? Is any special fund to be appropriated for the payment of debts and legacies? Is he a shareholder in joint-stock companies?

Let it now be supposed that the person taking instructions for the will has fully and accurately acquainted himself with the situation of the testator's family and other intended objects of his bounty, and of the property upon which his will is designed to operate.

I. As to the objects of gift.

Objects of gift.

Where a testator is married but has no child, provision should nevertheless be made for children hereafter to be born (unless it is unreasonable to contemplate his having children by his present wife), or the will should expressly be made contingent on his leaving no issue surviving him. Similarly, provisions for the children of a married testator should not be confined to those *in esse* at the date of the will.

Provision for widow.

An immediate legacy to the widow, to defray the current expenses of the family, is generally proper. In making a permanent provision for the widow, it is to be considered whether the testator will give her a life income only, or an absolute transmissible interest in any portion of his property. The law, in its provision for widows, furnishes an example of each mode: dower, which is the widow's provision out of the realty, being a life interest; and her share in the personalty, under the Statute of Distributions, being an absolute property. The former mode of provision seems in general most consistent with testamentary arrangements, especially where there are children, whom the testator commonly intends shall take ultimately the bulk of his property. Indeed, even the life interest of the widow is frequently made to cease on her marrying again, where the testator has children, to

whom such an event might be prejudicial; otherwise the restriction is not ordinarily to be recommended.

Widow's position in regard to testator's children.

If any of the testator's children are minors, or are otherwise incapable of providing for themselves, it is advisable to charge the widow (if she takes a life interest in the whole property) with the obligation of maintaining them, unless the testator feels himself secure in leaving this duty to the spontaneous exercise of parental affection. It may sometimes be desirable also to confide to the widow, when she takes only a life interest, and there is a gift over to children equally and absolutely, a power *by will* to regulate and modify the shares of the children so as to adapt them to any change of circumstances occurring in her lifetime; and such power, if confided, should extend to enable the donee to appoint to more remote issue; for various circumstances (such as the bankruptcy, imprudence, or mental imbecility of a child) might render it advisable to exclude him from any share, and substitute his issue as objects of the testator's bounty. Another salutary effect of such a power is, that it imposes some check on the sale or mortgage by the children of their reversionary interests.

If it is deemed advisable that the children should take some benefit in possession during their mother's lifetime, a certain portion of their shares, say one-half or a third, may be made to vest in possession at majority or marriage in the lifetime of the widow, or, which is more common, a pecuniary legacy may be given to them, payable at majority or marriage; and this more especially deserves consideration, if the children's shares are made contingent (but this is seldom advisedly done) on their surviving the testator's widow, and she has no power of appointment by deed or of advancement, as she would then be unable to accelerate the payment of the children's shares.

Provisions for children.

The mode of providing for children is of course a more fertile, and therefore more difficult, topic of remark; but, before offering any suggestion on this head, it should be observed, that, where a testator is about to provide for his wife and children, it should be ascertained whether they take any and what interests under any marriage or other settlement of the testator, which may greatly influence the

dispositions in the will. Testators often treat settled property as their own; and the assertion by some of the legatees of their claims under the settlement deranges the testamentary scheme, and gives rise to nice questions concerning the doctrine of election.

As to the advancement of, and loans to, children.

Another point to be ascertained is, whether any of the children have been or are likely to be advanced by the testator in his lifetime, and whether such advancements are to be deducted out of their shares, and whether any children to whom money may have been advanced by way of loan are to be treated as debtors of the estate in respect of such advances or not.

Period of vesting of children's shares.

The shares of sons are in general made to vest absolutely at majority, and those of daughters at majority or marriage; and the advantage of this plan is, that, if they afterwards die during the life of the widow (whom we suppose to take a life interest), the provision does not fail by such event, but devolves upon their personal representatives. If the vesting of the shares is postponed until the death of the widow, care should be taken that the issue of such of the children as antecedently die are made to stand in their parent's place, though even this is less eligible than making the shares vest at majority or marriage; because, by the latter plan, a child marrying in the lifetime of the widow is enabled to make a settlement upon, and to communicate a benefit to, the objects of such marriage.

Postponement of vesting until widow's decease, inexpedient.

Where all the intended objects are adult, and are to take absolute shares, the will may be very simple in its form, as the disposition in favour of the children will consist of a mere absolute trust; and, indeed, unless the widow takes a previous life or other temporary interest, there will be no occasion for any trust at all. The whole of the testator's property may be given to his children, in equal or (as the intention may be) unequal shares.

Mode of providing for married daughters.

Where, however, any of the children are daughters who are married, it is generally advisable that their shares should be subjected to such trusts as will take them out of marital control. If the matter is left to the operation of the Married Women's Property Act, 1882, or if the share in question

(supposing it to be personal estate) is simply given in trust for the daughter for her separate use absolutely, the effect is to authorise the executors to pay or transfer the fund or property to the daughter, without the concurrence of the husband; but this does not prevent the daughter herself from handing it over to the husband, so that the testator's object is but inadequately attained. In order effectually to exclude marital influence in the affair, the power of the daughter herself must be curtailed; to effect which it is usual to vest the property in trustees for the daughter during her life, and while married, for her separate and inalienable use, and, after her decease, in trust for her children or more remote issue as she shall appoint; and, in default of appointment, in trust for her children equally; and, in default of children, in trust for such persons as the daughter shall by deed or will appoint; and, in default of appointment, for her next of kin. A trust for children, however, is not essential to secure the property as an inalienable provision for the daughter. If it is intended to give her all the control which is consistent with this object, the trust should be for her separate and inalienable use during coverture, with remainder to such persons as she shall by deed or will appoint; and, in default, to her next of kin: in which case, of course, the property is effectually devoted to the prescribed trusts during the coverture of the daughter, after the expiration of which (the restraint on anticipation being at an end) she would be able, by an exercise in her own favour of her power of appointment by deed, to acquire the absolute interest, and entitle herself to call for a transfer of the fund. Sometimes the power is confined to appointment by will, with the view of precluding an irrevocable appointment in favour of a husband or any other person.

Trusts for separate use.

Similar trusts should be created of the shares of unmarried daughters, unless the testator can confide to their prudence the task of making proper settlements for themselves on marriage.

As to unmarried daughters.

With respect to unmarried daughters, however, it is not in the power of the testator to make a life provision absolutely inalienable, as the legatee, if unmarried at the death of the

testator, or at any subsequent period, may, while sole, disregard any restriction on the anticipation of her life interest, though the testator may of course visit such act with the penalty of forfeiture; but this is a strong measure, and not in ordinary cases to be recommended. The trusts adapted to coverture, unless defeated by a positive act on the part of the daughter herself, while sole, will take effect when such coverture occurs.

As to giving life interests to husbands of daughters.

A testator may choose to give to the surviving husband of a daughter, whose share after her decease is settled on her children, a life interest in the property, or (which seems better) to empower the daughter herself to limit such an interest; and if this power is made exercisable by will only it has the effect of securing to the daughter a degree of influence during her life, as the power cannot be irrevocably exercised.

Powers to trustees to settle shares of daughters marrying during minority.

Sometimes it may be proper to give to trustees a power of settling the shares of children who marry during minority, especially in the case of a daughter who has a reversionary share in a money fund; in such a case it was not, until recently, in the power of either of the marrying parties, even though the intended husband was adult, to make an absolute settlement, as his marital interest (which, if the fund was an interest in possession, would render the settlement effectual) was subject to the wife's contingent right of survivorship, which her minority prevented her from binding before, and her coverture after, the marriage. But now that, by the 18 & 19 Vict. c. 43, male infants not under 20, and female infants not under 17, can, with the sanction of the Chancery Division (to be obtained by summons, without the institution of a suit), make a valid and binding settlement upon or in contemplation of marriage (*e*), there is less necessity for investing trustees with discretionary powers of making settlements of the shares of daughters marrying during minority.

18 & 19 Vict. c. 43.

(*e*) Whether an infant can make a post-nuptial settlement, *quære*, *In re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457; 50 L. T. 435; *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661; 58 L. T. 565.

Gifts to a reputed wife or to illegitimate children should be given free from legacy duty; and in providing for the latter persons, care should be taken to dispose of the property in the event of their death during minority, or without having themselves effectually disposed of the same.

If any of the legatees are debtors to the testator, it should be shown whether the debts are to be brought into account; and if any of them are creditors of the testator, whether the legacies are to go in satisfaction of their claims.

It is often convenient to authorise the payment of legacies which may be small in amount to the parents or guardians of infant legatees, with a direction that the receipts of those persons shall discharge the executors or trustees. And generally the investment of legacies belonging to minors should be authorised instead of leaving the executors to pay them into Court under 36 Geo. 3, c. 52, s. 32.

Subjects of gift.

II. As to the subjects of gift.

It remains to be considered what are the modes of disposition best adapted to various species of property.

Household goods, &c.

Household goods and other perishable articles should, in general, be given to the immediate takers out and out. It is seldom intended that they should be sold; and the creation of life or other partial interests in such property is attended with much inconvenience. Where such partial interests are bequeathed, it should be ascertained whether the temporary possessor is to give any security to the ulterior taker for the preservation of the chattels in question. The creation of a partial interest in live stock is also objectionable, on account of the difficulty of regulating the precise mode of enjoyment, and of adjusting the relative claims of the immediate and ulterior takers. It is better either to give such property absolutely in possession, or, if the testator wishes to create a life interest, to direct the stock to be sold, and the proceeds invested, and the income to be paid to the intended legatee for life, the capital being made divisible at his death.

Live stock.

Trusts for conversion.

Where the general residue of personal estate is given to a person for life, it should be distinctly ascertained and shown whether the legatee is to enjoy the use or income of the

property in its actual state, or whether it is to be converted, and the proceeds invested upon government or real securities. This is especially important where any part of the property is of a wasting or deteriorating nature, as annuities or leaseholds of short duration, since property of this description obviously throws into the hands of the immediate taker a larger income than an investment of the proceeds would yield. On the other hand, if any part of the residue consists of reversionary or other future interests, the case is reversed, and the legatee for life is the person interested in requiring an immediate sale. A want of explicitness as to this point has occasioned much litigation. In general, where the purposes of the will require (as they commonly do) that some part of the residuary property should be sold, the best course is to subject the whole to a trust for sale and conversion, and to give the trustees a discretionary power of continuing the property in its actual state so long as they may deem it expedient so to do, and of paying the income to the persons who would be entitled to the interest of the invested fund. If real estate is included in the trust, it should be expressed that this discretion is not to affect the transmissible quality of the estate, which, under the absolute trust for conversion, would be that of personalty.

As to giving realty in undivided shares.

Where a testator has real estate which he intends to be enjoyed by members of his family in undivided shares, it is in general advisable that the property should be impressed with a trust for sale and conversion, with a power to the trustees (as above suggested) to suspend indefinitely the execution of the trust, as a joint ownership or ownership in common is inconvenient, and commonly terminates either in a partition, which is often an expensive and operose measure (especially if any of the parties interested are under personal incapacity), or in a sale; and it is to be remembered that the existence of an absolute trust for sale and conversion does not prevent the parties beneficially entitled, all concurring (*f*),

(*f*) And their estates being absolute and indefeasible, *Sisson* v. *Giles*, 3 D. J. & S. 614; 32 L. J. Ch. 606; 8 L. T. 233; but as to election during a contingency, see *Meek* v. *Devenish*, 6 Ch. D. 566; 36 L. T. 911.

from electing to retain the property in entirety as land. The plan pursued by some conveyancers of eminence is to give the trustees the legal estate, and then a discretionary power of sale; and this method has been found in practice to work well. If, for any reason, this plan is not adopted, care should be taken to express that the devisees are to take as tenants in common and not as joint tenants.

Suggestions where property is subject to incumbrances.

If any of the real estate is in mortgage, it should be ascertained whether the devisee is to take it exonerated from the incumbrance; the law being, that, in the absence of any evidence of intention to the contrary, the personal estate is not applicable in discharge of the mortgage, but the devisee takes the estate *cum onere;* and a direction that the testator's debts be paid out of his personal estate is insufficient to exonerate the mortgaged real estate, unless the direction refers expressly to mortgaged debts, or the will otherwise shows unmistakably that the testator intended the devisee to take *sine onere*. And here it may be remarked, that an estate in mortgage ought never to be devised to uses in strict settlement or otherwise subjected to limitations in favour of infants or unborn persons, without being accompanied by a power of sale, or without some other effectual means being provided for raising the money, if called in by the mortgagee.

Charge of debts.

The same remark applies where the testator has charged the estate so devised with the payment of his debts; and it is to be remembered that the law, without any act of the testator, has now brought this burden (though in a somewhat different mode) on the land; so that if the real estate is likely to be resorted to for this purpose, the proper machinery should be provided for rendering it conveniently available by sale or mortgage. When a testator subjects his real estate to debts, legacies, or annuities, it should be ascertained and distinctly indicated whether he intends to make the land the primary fund, or merely that it should supply any deficiency in the personal estate. The latter would be presumed where the contrary does not appear; but obscurity on the point has been a prolific source of litigation.

Whether the vesting or the

Another and very important suggestion is, that whenever the enjoyment of the subject of gift (whatever be its nature)

is postponed to a period subsequent to the testator's decease, it should be ascertained whether the vesting is also to be deferred; in other words, whether the devisee or legatee is immediately to take such an interest as will pass to his representatives in the event of his dying before the period of enjoyment. Where the vesting is postponed until majority, or any other period, the destination of the income in the meantime should be provided for.

enjoyment only is to be postponed.

The extent of the discretionary authority of trustees is always a point upon which a testator's intention should be carefully ascertained (*g*). The nature of the powers adapted to various circumstances will be collected from the Precedents. Liberality, without excessive indefiniteness, is the desideratum. If special and onerous duties are imposed on trustees, a large discretion should be confided, and, in such cases, a pecuniary allowance for the extraordinary trouble of management may be a prudential measure. This remark particularly applies where executors are directed to carry on a business, as such a duty involves a greater amount of risk and trouble than can be fairly exacted from the gratuitous services of a trustee. Even in ordinary cases, a pecuniary legacy to executors for their trouble seems proper, especially if they are strangers, taking no beneficial interest under the will. And here it may be remarked, that, with a view to the protection of the trustees, and the making provision for the due administration of the affairs, the extent of a testator's engagements to third persons, and especially his rights and responsibilities with respect to any partnership concern, or any joint stock company, in which he may be engaged, may be a proper subject for inquiry and provision.

Discretionary powers of trustees.

Testator's engagements and responsibility as partner or otherwise.

(*g*) A direction by a testator that a certain person should be employed as agent and manager of the testator's estates, whenever his trustees should have occasion for the services of a person in that capacity, was held not to create a trust which such person could enforce, *Finden* v. *Stephens*, 2 Ph. 142; 17 L. J. Ch. 342; 78 R. R. 55; and see *Shaw* v. *Lawless*, 5 C. & F. 129; 47 R. R. 41. So, also, a direction in a will that a particular person shall be solicitor to the estate imposes no obligation on the trustees to employ that person as solicitor, *Foster* v. *Elsley*, 19 Ch. D. 518; 51 L. J. Ch. 275.

General suggestions. Specific devise.

III. General suggestions.

Where real estates are to be specifically devised, it is well to see the title deeds, or an abstract of the recent title. Mis-description, omission of parcels, mis-statements of tenure, &c., may thus be avoided; and if the lands are described by their situation and occupancy, it should be seen that the two parts of the description are co-extensive.

Settlement.

A marriage or other settlement of the testator should be inspected.

Contract for purchase or sale.

If any contract for the purchase or sale of realty is likely to be pending at the testator's death, the destination of the estate or of the purchase-money should be provided for.

Partnership.

If the testator is in partnership, it would be well to examine the partnership articles, to see if they contain any power to be exercised by will.

Charge of debts.

Especial care should be taken to provide for the payment of debts and legacies; for the exoneration therefrom of such parts of his property as the testator may wish to exclude; and if the realty is charged therewith, whether in exoneration or only in aid of the personalty, the requisite machinery for working out the charge should be expressly provided.

Gift to a class.

Where there is an immediate gift to a class, the components of which may not be in existence at the death of the testator, the destination, in that event, of the intermediate income should be ascertained. Moreover, in every gift to a class, the period at which the class is to be ascertained should be made clear beyond the possibility of doubt.

Survivorship.

In all cases where there are limitations to survivors, the period to which the survivorship is to be referred should be most clearly expressed.

Precatory words.

Precatory words, or words of recommendation, should be avoided. If it be intended to impose a legal obligation, a definite trust should be created.

Powers.

General powers vested in the testator over the beneficial interest in realty and personalty will be exercised by a general disposition, unless a contrary intention appears. It should be borne in mind, however, that as to powers, whether general or special, testators may wish the property to go as in default of appointment; and this wish may (especially as

regards powers of revocation) be defeated by an unguarded general disposition.

Annuities.

If annuities are given, it should be shown how they are to be raised; whether by the purchase by the executors of a government or other annuity, or by the appropriation of a particular fund, or as a charge on a particular estate.

Legacy duty.

Annuities, rent-charges, and life interests should be given clear of legacy duty. A saving is effected by giving all legacies clear of duty.

Lapse.

Provision should be made for lapse; and in the case of contingent gifts for the non-concurrence of the contingency.

Copyholds.

In disposing of copyholds, a power of appointment should invariably be given, either to trustees or to the beneficial owner, or to both.

Trustees' powers.

Powers to trustees of investment, and to vary securities, should be inserted when it is not thought desirable to rely on the powers to invest conferred by the Trust Investment Act, 1889; as to which, see note (*b*), Prec. IV.; and power to apply a definite portion of the shares of minors for their advancement should be inserted as a matter of course. The power to apply income for the maintenance of infants, and the common power to give discharges, may now be omitted; but a power to appoint new trustees may or may not be necessary. The common indemnity clauses to trustees are of little or no importance.

Solicitor-trustee.

If a solicitor is appointed an executor or trustee, and it is intended that he should be remunerated, a clause should be inserted entitling him to charge for all work done by him in connection with the executorship or trust, in the same manner and to the same extent as if, not being himself such executor or trustee, he had been employed by the executors or trustees to do such work professionally as their solicitor.

Gifts over.

In limiting gifts over to take effect upon the failure or determination of prior interests, great care should be taken that the events, upon the happening of which such gifts over are to take effect, should correspond exactly with the events upon the happening of which such prior interests are to fail or to be determined.

Illegitimate children.

In leaving property to children as a class, or otherwise, it

should be ascertained that all the children intended to be benefited are legitimate. If any of them are illegitimate, the intention of the testator that they should participate should be clearly expressed.

As to preparing codicils.

Lastly, no person should attempt to prepare a codicil which is intended to revoke, alter, or modify any disposition in the will, or in a previous codicil, without seeing such prior testamentary document, the contents of which are often very imperfectly recollected and stated by the testator.

# DIRECTIONS AS TO THE EXECUTION OF A WILL.

The will must be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction. If the will consists of several sheets, it is well, though not essential, that the testator sign each sheet, for the purpose of identifying it, and of preventing interpolation.

In addition to the signature at the end of the will, the testator should sign, or cause to be signed, his name or initials in the margin opposite to any interlineation, erasure, or other alterations which may have been made before the execution of the will.

The signature at the end must be made or acknowledged by the testator in the presence of two witnesses present together; and they, immediately thereafter, without separating and without quitting the testator's presence, should sign their names under the attestation clause.

The attestation clause should be written at the end of the will. Before or immediately after the witnesses have thus subscribed their names, they should sign their names or place their initials in the margin opposite to any such interlineation, erasure, or other alteration as is hereinbefore referred to. It is proper, though not essential, that the attestation clause should be read over by or to the witnesses before they subscribe their names.

It must be carefully borne in mind that the execution of the will should be one transaction, and that the testator should be in such a position as that he might see the witnesses in the act of attesting and subscribing his will.

No person to whom or to whose wife or husband any beneficial devise or bequest is made by the will should be

an attesting witness, for thereby such devise or bequest is rendered void.

No alteration whatever should be made in the will after it is executed; any change should be effected by a new will or by a codicil, which must be executed in the same way as a will is required to be executed.

It is highly desirable, though not absolutely essential, that the witnesses should be aware of the testamentary character of the instrument.

To facilitate the proof of the will, the occupation and place of abode of each witness should be added.

## PUNCTUATION.

Punctuation. It is well known that from legal instruments punctuation and parentheses are excluded; or, if admitted, that they are disregarded in the construction of the instrument. Stops, though used in the printed copies of Acts of Parliament, are omitted from the Parliament rolls. The absence of stops from conveyances, and the framing of the sentences so as to be independent of their aid, has been attributed to the natural desire that everyone must feel that the title to his estates should not depend on so trivial a circumstance as the insertion or omission of a comma or semicolon (*h*); while the necessity of expressing the meaning unequivocally, without the aid of such marks, has been alleged as one cause of the apparent tautology and verboseness of legal instruments (*i*).

Parentheses. It would seem, however, that, in construing wills, marks of punctuation occurring in the original (*k*), parentheses, capital

(*h*) Williams, R. P., Part I., ch. X.

(*i*) 1 Byth. & Jarm. 368.

(*k*) *Oppenheim* v. *Henry*, 9 Ha. 802, n.; and see *Gascoigne* v. *Barker*, 3 Atk. 8; *Banks* v. *Denshire*, 1 Ves. s. 63; *Morrall* v. *Sutton*, 1 Ph. 533; 65 R. R. 434, as to parentheses; *Compton* v. *Bloxham*, 2 Col. 201; 70 R. R. 178; *Child* v. *Elsworth*, 2 D. M. & G. 679; 95 R. R. 285; *Gauntlett* v. *Carter*, 17 Be. 586; 99 R. R. 303; *Manning* v. *Purcell*, 7 D. M. & G. 55; *Jebb* v. *Tugwell*, *ib.* 608; *Manchee* v. *Kay*, 3 Giff. 545, as to stops, &c., and the inferences to be drawn from the state of the original instrument.

letters, &c., may be taken into consideration. But it is from the words and the context, not from the punctuation, that the testator's meaning is to be collected; though where the words are of doubtful meaning, the punctuation and other circumstances may be referred to for the purpose of assisting in the explanation (*l*). Stops, &c.

(*l*) *Sandford* v. *Raikes*, 1 Mer. 646; *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

# CONCISE FORMS OF WILLS.[a]

## No. I.

WILL *giving to one absolutely all the Testator's Real and Personal Estate.*

**Prec. 1.**

I A. B. of &c. [*testator's name residence and quality*] hereby REVOKE all testamentary writings heretofore executed by me and declare this to be my last will made and executed on the day of 19 I DEVISE and bequeath all my real and personal estate unto [*devisee's name residence and quality*] absolutely AND I APPOINT the said [*name*] sole executor of this my will IN WITNESS whereof I have hereunder set my hand

[*Testator's signature*]

Form of attestation.

Signed by A. B. of &c. as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have subscribed our names as attesting witnesses (*b*)

[*Two witnesses*]

**NOTES to Precedent I.**

(*a*) The following forms may be used *mutatis mutandis* for the wills of women, married or single.

45 & 46 Vict. c. 75.

Under the Married Women's Property Act, 1882, the gift to a married woman may be made without the intervention of any trustee, and she will have power to hold and dispose by will or otherwise of the real and personal estate as if she were a *feme sole* (sect. 1), whether she was married before or after the 1st January, 1883, the date of the commencement of the Act (sect. 5). The 18th section empowers her to act as executor, without her husband, so that the question raised in *Clerke* v. *Clerke*, 6 P. D. 103; 50 L. J. P. 69, 78, is not likely to arise again. And if the sole object is to give an absolute interest for the separate use of a married woman, or place her in the position of a *feme sole* as regards

Notes to Prec. 1.

the property, there is no longer any reason why the will should differ in form from a testamentary disposition in favour of any other beneficiary taking absolutely; but see note (*f*), Prec. IX. But if it is desired to impose a restraint on anticipation, the next following Precedent should be adopted, which will probably be better suited to the majority of cases in which provision is made for a married woman. The will of a married woman, who died in the lifetime of her husband, made during coverture and prior to the coming into operation of the Married Women's Property Act, 1882, she having at the time capacity to make a will, was effectual without re-execution to pass separate property which she acquired under the provisions of the Act, *In re Bowen*, '92, 2 Ch. 291; 61 L. J. Ch. 432. And now by sect. 3 of the Married Women's Property Act, 1893, "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband."

See further as to wills of married women to whom the Act of 1882 applies, *ante*, pp. 9, 10.

It is clear that as to any married woman, at whatever date she may have married, she may, without her husband's consent, make a will for the purpose of appointing an executor to continue the representation of a prior testator, *Scammell* v. *Wilkinson*, 2 Ea. 552; *Hodsden* v. *Lloyd*, 2 Br. C. 534, 543; but it would seem that the chain of executorship is not necessarily continued by the appointment of an executor by a married woman in a will made under a power, *In b. Hughes*, 4 Sw. & Tr. 209; *In b. Bridger*, 4 P. D. 77; 47 L. J. P. 46. Any married woman may also, without her husband's consent, bequeath personalty settled to her separate use, *Fettiplace* v. *Gorges*, 1 Ves. 46; 1 R. R. 79; and devise or bequeath real or personal property by virtue and in exercise of a power duly created for that purpose. At one time there was some doubt whether, without the machinery of a power, she could effectually devise, as against her heir, the equitable interest in real estate settled to her separate use; or rather whether the fee could be constituted her separate estate. But it was afterwards settled that where real estate is given to trustees in fee upon trust for the separate use of a married woman in fee (the terms of the trust being such that the separate use attaches upon the *corpus*, *Troutbeck* v. *Boughey*, L. R. 2 Eq. 534; 35 L. J. Ch. 840), she has the same power of disposition by deed or will over the equitable fee as if she were a *feme sole*, *Taylor* v. *Meads*, 4 D. J. & S. 597; 34 L. J. Ch. 203. And if the legal fee is in the married woman herself, she can devise the equitable fee, and the heir-at-law is a trustee of the legal estate for her devisee, *Hall* v. *Waterhouse*, 5 Gif. 64; 12 L. T. 297.

Power to devise fee settled to her separate use.

As to the testamentary power of a woman judicially separated from her husband, see 20 & 21 Vict. c. 85, s. 25. And as to the will of a married woman deserted by her husband, and who had obtained a

Separated from her husband.

**Notes to Prec. 1.**

Protection order.

protection order under 20 & 21 Vict. c. 85, s. 21, see *In b. Faraday*, 2 Sw. & Tr. 369; 31 L. J. P. 7; *In b. Elliott*, L. R. 2 P. & D. 274; 40 L. J. P. 76; 25 L. T. 203. In *In b. How*, 1 Sw. & Tr. 53; 27 L. J. P. 37, where the husband of the testatrix had not been heard of for seven years, probate was granted as if the testatrix had died a widow.

Will of personalty with consent of husband.

A woman married before 1883, and the title to whose property was acquired before that date, can make a valid will of personalty which is not settled to her separate use, but requires the consent of her husband, *Mariot* v. *Kinsman*, Cro. Car. 219; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 75. In such case the death of the husband in his wife's lifetime revokes his assent to the will, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345; 32 L. T. 410, and the husband can revoke his consent at any time during his wife's life. It was formerly thought that he could do so at any time after her death before the will was proved (Shep. Touch. 403); but it has been held, that, when the husband has once assented after his wife's death, he cannot revoke his assent, though probate has not been granted, *Maas* v. *Sheffield*, 1 Rob. 364. In that case a married woman made a will, not under any power of appointment, and not purporting to dispose of her separate estate; her husband was a witness, and after her death gave his consent in writing to the will; it was decided that he could not afterwards withdraw his consent. See Deane, Wills, 65; see also *In b. Reay*, 4 Sw. & Tr. 215; 31 L. J. P. 154; *In b. Cooper*, 6 P. D. 34; 50 L. J. P. 41; 44 L. T. 111. In *Badeley* v. *Lyte*, a wife's will submitted (but not consented) to by the husband, who was ignorant of his power of giving or withholding consent, was pronounced against (Prob. Ct., 16th December, 1859). The husband must have full knowledge of his rights to render his consent binding.

Husband's power of revocation of consent.

Attestation clause.

(*b*) It is suggested that the attestation clause should be complete in itself without requiring any reference to the body of the will. Though not essential, it is highly desirable that the witnesses should know that the writing they attest is a will. Witnesses of intelligence and respectability should be selected, and preference is to be given to professional men, whose subscription of the memorandum of attestation raises a presumption that the formalities of execution have been strictly attended to. Moreover, there is greater facility in finding such witnesses, if living, and in proving their handwriting, if dead. The witnesses should not be persons who, or whose wives or husbands, take any benefit under the will.

Selection of witnesses.

Formal execution of instructions for will.

The Wills Act, by subjecting wills of every kind to the requisitions of signature and attestation, has of course deprived mere unattested instructions, in the handwriting of a third person or even of the testator himself, of all operation. It seems advisable, therefore, where a testator is *in extremis*, that the instructions should, if adequately expressed to convey his intention, be duly signed and attested according to the statute, in order to guard against sudden death or incapacity occurring before the preparation and execution of the more formal instrument. Moreover, practitioners would be well advised to make it their practice to

**Notes to Prec. 1.**

preserve all written instructions which they may receive from the testator, inasmuch as if any question should arise as to the competency of the testator, or as to his knowledge or approval of the contents of his will, such instructions may prove of the utmost importance. A convenient practice is to keep such instructions with the draft will.

For forms of testimonium and attestation clauses, see end of Miscellaneous Forms, printed after the Precedents.

## No. II.

WILL *disposing of Real and Personal Estate in favour of Testator's Daughter, a married Woman, for her separate Use, restrained from Anticipation.*

Devise of messuages for separate use of married daughter.

THIS IS THE LAST WILL of me [*testator's name residence and quality*] I REVOKE all prior wills I DEVISE all my messuages and hereditaments situate at —— in the county of York (*a*) and all other the real estate to which I may be entitled at my death To such uses for such estates and generally in such manner as my daughter [*name*] the wife of —— shall whilst covert by will or when discovert by deed or will appoint And in default of such appointment To the use of —— and —— [*names of trustees*] their executors administrators and assigns during the life of my said daughter Upon trust to pay the rents and profits of the said messuages and hereditaments to my said daughter for her separate use without power of anticipation And from and after the death of my said daughter To the use of the person or persons in fee simple and if more than one in equal shares who at the death of my said daughter would be entitled by descent to the said messuages and hereditaments in case she had died intestate and seised thereof in fee simple by purchase I

Bequest of personal estate upon trust to convert and invest;

BEQUEATH all the personal estate of which I shall die possessed Unto the said —— and —— [*trustees' names*] Upon trust to call in or sell and convert the same into money (*b*) and to pay thereout my debts and my funeral and testamentary expenses and a legacy of £—— to my said daughter (which legacy I direct shall be paid as soon as possible after my decease) and subject thereto (*c*) upon trust to invest the

—pay income to daughter for her separate use.

residue (*d*) And to pay the income and annual proceeds of the said investments to my said daughter [*name*] during her life for her separate use without power of anticipation And from and after the death of my said daughter as to as well

the capital as the income of the said investments Upon trust for such person or persons and if more than one in such shares and generally in such manner as my said daughter shall whilst covert by will or when discovert by deed or will appoint And in default of any such appointment or so far as any partial appointment shall not extend Upon trust for the person or persons who at the death of my said daughter shall be of kin to her and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she had died a widow and intestate such persons if more than one to take in the shares prescribed by the same statutes I declare that no apportionment of the rents of my said real estate shall take place in respect of the period current at my death I appoint the said —— and —— to be executors of this my will In witness whereof I have hereunto set my hand this —— day of —— 19 **Prec. 2.**

**NOTES to Precedent II.**

(*a*) Wills devising lands in Yorkshire or Middlesex should be registered in the Registry Offices of those counties. The Registry for the West Riding of Yorkshire is at Wakefield, for the East Riding is at Beverley, for the North Riding is at Northallerton. The Middlesex Registry is at No. 12, Great James Street, Bedford Row. Registration of wills in York and Middlesex.

The Registry Act for Yorkshire is the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), amended by 48 & 49 Vict. c. 4, and 48 & 49 Vict. c. 26.

The Registry Act for Middlesex is the Middlesex Registry Act, 1708 (7 Anne, c. 20), amended by 54 & 55 Vict. c. 64.

By sect. 127 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87) (subject to the exception contained in the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.), land registered under that Act is exempt from the jurisdiction of the Yorkshire and Middlesex Registries.

The Land Transfer Act, 1897, s. 20, enables His Majesty, by Order in Council, to render registration compulsory on sale in any one county to be selected by the Order.

For the procedure under the Acts, and for the effect of registration in giving priority to registered over unregistered instruments, the reader is referred to the Acts themselves and the rules made thereunder.

In the opinion of the present editor the subject is too special to justify the insertion in this place of any elaborate notes upon it.

(*b*) It was formerly necessary, or at any rate desirable, to insert in wills clauses empowering executors and trustees to give effectual receipts for money, and to do many other acts which they might have Trustee clauses.

**Notes to Prec. 2.**

occasion to do in execution of the trusts and powers reposed in them, but which they were unable to do effectually in the absence of special authority. It was also customary to insert clauses indemnifying executors and trustees against liability for the acts, neglects, and defaults of their co-executors or co-trustees, or of bankers, brokers, solicitors, and others, whom they might have occasion to employ in the course of the executorship or trust business. It became, however, of late years increasingly of less importance to insert clauses of this character, by reason of the statutes which were passed from time to time conferring wider powers and indemnities upon executors and trustees. Amongst such statutes the best known are Lord St. Leonard's Act (22 & 23 Vict. c. 35, 13 Aug., 1859), Lord Cranworth's Act (23 & 24 Vict. c. 145, 28 Aug., 1860), the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and the Trustee Act, 1888 (51 & 52 Vict. c. 59). The provisions of these and other Acts to the like effect have been re-enacted by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

Unless it should be considered desirable in any particular case to amplify or abridge the powers and indemnities conferred upon executors and trustees by this Act, it is unnecessary now to insert in wills any clauses of the character formerly considered necessary.

The sections of the Trustee Act, 1893, which are of importance for the purposes of the present note, are as follows:—

Power of trustee for sale to sell by auction, &c.

Sect. 13.—"(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2.) This section applies only if and so far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the 31st of December, 1881."

Power to sell subject to depreciatory conditions.

Sect. 14.—"(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid. **Notes to Prec. 2.**

(4.) This section applies only to sales made after the 24th day of December, 1888."

Sect. 15.—"A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874." Power to sell under 37 & 38 Vict. c. 78.

Sect. 17.—"(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. Power to authorise receipt of money by banker or solicitor.

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4.) This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

(5.) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

Sect. 18.—"(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot), not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof, or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income. Power to insure building.

(2.) This section does not apply to any building or property which a

**Notes to Prec. 2.**

trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust."

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

Sect. 19.—"(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust."

Power of trustee to give receipts.

Sect. 20.—"(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act."

Power for executors and

Sect. 21.—"(1.) An executor or administrator may pay or allow any debt or claim on any evidence he thinks sufficient.

**Notes to Prec. 2.**

(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee, whereby the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them may seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

trustees to compound, &c.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4.) This section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act."

Sect. 22.—"(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

Powers of two or more trustees.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the 31st day of December, 1881."

Sect. 23. "A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Exoneration of trustees in respect of certain powers of attorney.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

Sect. 24. "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the

Implied indemnity of trustees.

**Notes to Prec. 2.**

insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

(*c*) The object of leaving a legacy to the daughter is to provide her with ready money for mourning or other necessaries before she comes into receipt of income. If not considered desirable in any particular case, this legacy may be omitted.

(*d*) See note (*b*), Prec. IV.

## No. III.

WILL *disposing of Real and Personal Estate in favour of the Testator's Widow and two Adult Sons, the Widow taking a Legacy, and subject thereto a Life Estate in the Entirety.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*] I REVOKE all testamentary writings heretofore executed by me I DEVISE all the real estate to which I shall be entitled at the time of my death UNTO and to the use of my wife [*name*] (*a*) for her life without impeachment of waste AND after her decease To the use of my two sons [*name*] and [*name*] as tenants in common in fee simple in equal moieties I BEQUEATH all the chattels real and personal estate to which I shall be entitled at the time of my death unto my said wife and sons Upon trust to sell and convert the same into money and thereout to pay my debts and funeral and testamentary expenses and a legacy of £—— to my said wife (which legacy I direct shall be paid as soon as possible after my decease) (*b*) and to invest the clear residue thereof (*c*) And upon trust to permit my said wife to receive the income of the said investments during her life and after her death to divide the capital thereof equally between my said two sons their respective executors administrators or assigns I declare that no apportionment of the rents of my said real estate shall take place in respect of the period current at my death but such rents when received shall be paid to my said wife as income AND I APPOINT my said wife and sons executors of this my will IN WITNESS &c.

Devise of real estate to widow for life;

—remainder to sons equally in fee.

Bequest of personal estate.

Upon trust to convert and invest;

—income to widow for life;

—after her death, capital to sons, equally.

**NOTES to Precedent III.**

(*a*) This applies only to the person who at testator's death is in the status and position of his wife. Therefore, if the testator in his lifetime obtains a divorce from his wife, the divorced woman will not take anything under this devise, *In re Morrieson*, 40 Ch. D. 30; 58 L. J. Ch. 80; 59 L. T. 847; in which case Kay, J., commented adversely on *Bullmore* v. *Wynter*, 22 Ch. D. 619; 52 L. J. Ch. 456; 48 L. T. 309. Also if in a

**Notes to Prec. 3.**

will there is a gift to the wife of another person, and there is at the date of the will and of the death of the testator a woman living known to the testator as the wife of that person, the gift *primâ facie* refers to that existing wife, and not to any subsequent wife that the other person may have, *In re Coley*, '03, 2 Ch. 102; 72 L. J. Ch. 502; 88 L. T. 517. Compare this last case with *In re Drew*, '99, 1 Ch. 336; 68 L. J. Ch. 157; 79 L. T. 656.

(*b*) The object of leaving a legacy to the wife is to provide her with ready money until she comes into the receipt of income. If not considered desirable in any particular case, this legacy may be omitted.

(*c*) See note (*b*), Prec. IV.

## No. IV.

WILL *of a* WIDOWER *devising his Real Estate to an only Son; bequeathing his Personal Estate to his adult unmarried Daughters, and on the Death or Marriage of all, the Capital to be equally divided amongst all his Daughters and the Children or remoter Issue of deceased Daughters.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*] I REVOKE all prior wills and codicils I DEVISE all my freehold and copyhold estates to my son [*name*] his heirs and assigns I APPOINT my said son —— and —— of &c. to be the executors of this my will AND I bequeath to them all my personal estate upon the trusts following that is to say As to my household furniture and effects UPON TRUST to permit such of my daughters as shall not be or have been married to have the use and enjoyment thereof so long as they or any of them shall live and remain spinsters or a spinster And subject thereto to hold the same upon the trusts hereinafter declared concerning my residuary personal estate AND AS to my chattels real and all the residue of my personal estate UPON TRUST to call in or sell and convert the same into money AND out of the moneys to arise therefrom to pay my debts and my funeral and testamentary expenses and a legacy of £—— to each of my said unmarried daughters (such legacies to be paid as soon as possible after my decease) (*a*) And to invest the net surplus (*b*) AND upon further trust to pay the annual income of the said investments to such of my daughters as for the time being shall not be or have been married so long as they or any of them shall live and remain spinsters or a spinster AND when and so soon as each and every one of my daughters shall have either died or married then and thenceforth to hold both the capital and the income of the said trust funds UPON TRUST for all my daughters living at the aforesaid period of distribution and the children

Devise of real estate to son.

Bequest of personal estate,

—for spinster daughters.

On death or marriage of all, to be divided amongst all the daughters and the children of deceased daughters.

**Prec. 4.**

then living of any daughters of mine then dead as tenants in common in course of distribution according to the stocks the children of a deceased daughter taking by substitution as tenants in common the share only which their mother if living at the period of distribution would have taken Provided that if any daughter of mine shall die having had any child or children who shall not be living at the period of distribution but who shall have left issue who shall be living at such period then such issue shall take and if more than one equally between them the share or shares which his her or their parent or parents would have taken had such parent or parents been alive at such period IN WITNESS &c. (*c*).

**NOTES to Precedent IV.**

(*a*) The object of leaving legacies to the daughters is to provide them with ready money until they come into the receipt of income. If not considered desirable in any particular case, these legacies may be omitted.

(*b*) Having regard to the wide range of trust investments authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), all investment clauses have been omitted from the precedents in this Edition. If in any particular case, it should be considered desirable to limit or extend the range of authorised investments, this can readily be done by the insertion of appropriate clauses.

The provisions of the Trustee Act, 1893, with reference to investments, are as follows:—

Authorised investments.

Sect. 1. "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:

(b) On real or heritable securities in Great Britain or Ireland:

(c) In the stock of the Bank of England or the Bank of Ireland:

(d) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(e) In any securities the interest of which is for the time being guaranteed by Parliament:

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

Notes to Prec. 4.

(g) In the debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company:

(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) In the 'B' annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such

**Notes to Prec. 4.**

commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court,

and may also from time to time vary any such investment."

Purchase at a premium of redeemable stocks.

Sect. 2.—"(1.) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act."

Discretion of trustees.

Sect. 3. "Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds."

Application of preceding sections.

Sect. 4. "The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust."

Enlargement of express powers of investment.

Sect. 5.—"(1.) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the

contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865."

Power to invest, notwithstanding drainage charges.

Sect. 6. "A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge."

Trustees not to convert inscribed stock into certificates to bearer.

Sect. 7.—"(1.) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(a) The India Stock Certificate Act, 1863;
(b) The National Debt Act, 1870;
(c) The Local Loans Act, 1875;
(d) The Colonial Stock Act, 1877.

(2.) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted."

Loans and investments by trustees not chargeable as breaches of trust.

Sect. 8.—"(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value

**Notes to Prec. 4.**

of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

Liability for loss by reason of improper investments.

Sect. 9.—"(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2.) This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

(*c*) The above precedent is one which should only be adopted under special circumstances. It is appropriate to a case where the testator's personal estate is not large and is not capable of yielding a larger income than the last daughter remaining unmarried will require for her support. The circumstance that the income left for the daughters or daughter remaining unmarried would be inadequate if the daughters marrying took their shares of the capital is the only justification for such a disposition as is made by this precedent. The inconveniences which may attend the adoption of the precedent are obvious enough:—For example, a testator leaves three daughters, two marry and have children and grandchildren, the third never marries, but outlives her married sisters and, perhaps, some or all of their children also. In such a case, neither of the married daughters nor their deceased children will have derived any benefit from the bequest.

## No. V.

WILL *disposing of Real and Personal Estate in favour of two Sons, of whom one is an Adult and the other a Minor.—Direction to purchase a Life Annuity.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I REVOKE all former testamentary instruments and appoint my son [*name*] and [*names* &c.] the executors thereof I DEVISE the dwelling-house at —— in which I now reside with the garden orchard and appurtenances thereto belonging and the pieces of land called respectively [*names*] now in my occupation situate in the said parish of —— with the easements and appurtenances therewith usually occupied or enjoyed (*a*) unto my said son absolutely (*b*) AND I DEVISE my messuage and lands (*c*) situate at —— now in the occupation of [*tenant*] as tenant thereof with the easements and appurtenances therewith usually occupied or enjoyed To my younger son [*name*] absolutely But in case my said younger son shall die under the age of twenty-one years then I DEVISE the last-mentioned hereditaments and premises to my said elder son absolutely I DECLARE that any mortgage debts affecting the hereditaments hereinbefore devised to my youngest son shall be discharged and satisfied out of my personal estate (*d*) AND that no apportionment of rents current at my death shall take place as between my said sons and my executors AND in case my younger son shall at my death be under the age of twenty-one years I APPOINT my executors or administrators executor or administrator for the time being during his minority to be trustees or trustee of the hereditaments hereinbefore devised to him for the purpose of managing the same and receiving and applying the income thereof during his minority and for the purpose also of exercising during his minority any of the powers of a tenant for life under the Settled Land Acts I DIRECT my executors to purchase in

Devise of real estate to uses in favour of elder son.

Devise of other real estate to like uses in favour of younger son.

Power for trustees to administer the younger son's estate during minority.

**Prec. 5.**

Direction to executors to purchase life annuity.

their names within twelve calendar months after my decease for the benefit of my servant [*name*] an annuity of 20*l.* (*e*) for her life payable in equal half-yearly or quarterly portions such purchase to be made in the discretion of my executors either from Government or any public company or from any private person or persons but so that the annuity if purchased from any private person or persons shall be well secured on real or leasehold property And I direct that until such purchase shall be made a like annuity shall be paid to her out of my general personal estate in equal quarterly portions the first portion to be paid at the end of three calendar months from my decease And I declare that the said [*annuitant*] shall not be allowed to have the value of the said annuity in lieu thereof And I further declare that in case the said [*annuitant*] shall do or suffer any act or thing whereby the said annuity or any part thereof shall be assigned charged or incumbered the said annuity shall cease to be payable to the said [*annuitant*] and shall thenceforth form part of my residuary estate I GIVE to my younger son if he shall attain the age of twenty-one years the sum of 2,000*l.* in Two and a-half per Cent. Consolidated Stock to be transferred to him within three calender months after he shall attain that age or if he should attain it in my lifetime within three calendar months after my death I DIRECT that the legacy duty and expenses incident to the bequests of the annuity and stock legacy hereinbefore respectively bequeathed shall be paid out of my residuary personal estate AS TO THE RESIDUE (*f*) of the real and personal property which may belong to me at my death I DEVISE AND BEQUEATH the same to my eldest son his heirs executors and administrators absolutely AND lastly I APPOINT the said —— and —— guardians of my younger son during his minority (*g*) IN WITNESS &c.

Bequest to younger son of stock legacy.

Direction to pay legacy duty.

Appointment of guardians.

**NOTES to Precedent V.**

Easements usually enjoyed.

(*a*) On the effect of the words "easements and appurtenances therewith usually occupied or enjoyed," see *Pheysey* v. *Vicary*, 16 M. & W. 484; *Wardle* v. *Brocklehurst*, 1 E. & E. 1058; 8 W. R. 241; *Ewart* v. *Cochrane*, 4 Macq. 117; 10 W. R. 3; *Pearson* v. *Spencer*, 3 B. & S. 761;

*Polden* v. *Bastard*, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; 13 L. T. 441; *Smith* v. *Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11; 13 L. T. 561; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210; 33 L. T. 164; *Barkshire* v. *Grubb*, 18 Ch. D. 616; 50 L. J. Ch. 731; 45 L. T. 383. And as to the limits of the doctrine of the "disposition of the owner of two tenements" (Gale, Easements, 111), see *Suffield* v. *Brown*, 4 D. J. & S. 185; 33 L. J. Ch. 249; 9 L. T. 627; *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126; 24 L. T. 209; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; *Russell* v. *Watts*, 10 App. Cas. 590; 55 L. J. Ch. 158; 53 L. T. 876. **Notes to Prec. 5.**

(*b*) If the property devised should be of copyhold tenure, it would be well, instead of devising it to the son in the simple form suggested, to give him a power of appointment over it, and to devise it to him in default of appointment: thus, "I devise [*description of property as in the case of a simple devise*] to such person or persons for such estate or estates and generally in such manner as my elder son [*name*] by any deed or deeds or by his last will shall appoint and in default of such appointment I devise the same unto my said son absolutely." Copyholds.

The advantage of reserving to a devisee a power of appointment over copyholds, instead of simply giving the property to him in fee, is that the insertion of the power (which it is clear may be created by will, *Flack* v. *Downing College*, 17 Jur. 697) enables the donee to appoint to a purchaser or any other person without being admitted, and therefore without incurring the fine and fees for admittance. The appointee or nominee is considered as coming in immediately under the will, *Holder* v. *Preston*, 2 Wils. 400; *Beal* v. *Shepherd*, Cro. Jac. 199; *Rex* v. *Lord of Manor of Oundle*, 1 A. & E. 283; *Glass* v. *Richardson*, 2 D. M. & G. 660; *Reg.* v. *Sir T. Wilson*, 3 B. & S. 201. Unless, however, the sale speedily follows the testator's decease, the lord of the manor can, by his right of seizing the land *quousque*, compel the admittance of the person or persons entitled to the legal ownership in the meantime, either under the will or by descent, *Glass* v. *Richardson*, *ubi sup.* To support the lord's right of seizure *pro defectu tenentis*, it has been held that there must be three proclamations at consecutive courts, *Doe* v. *Trueman*, 1 B. & Ad. 736. Where the lord had seized *quousque*, and had held for forty years, the customary heir was barred by the Statute of Limitations, *Walters* v. *Webb*, L. R. 5 Ch. 531; 39 L. J. Ch. 677. A devise by an unadmitted surrenderee confers no legal estate on the devisee, *Matthew* v. *Osborne*, 13 C. B. 919; 22 L. J. C. P. 241; and the lord cannot, in the absence of a special custom, be compelled to accept a surrender to the uses of an appointment by deed *inter vivos*, *Flack* v. *Downing College*, 17 Jur. 697.

Therefore, the only advantage of using the form of devise suggested at the beginning of this note is that it facilitates a sale by the devisee of the property if he should be desirous of selling it speedily after the testator's decease.

In the remaining precedents, the direct and simple form of devise is adopted.

**Notes to Prec. 5.**

According to 3 & 4 Will. 4, c. 106, s. 3, regulating the law of inheritance, the testator's elder son will take as a purchaser under the devise, and not by descent. In case of his death intestate, the land will descend to *his* heir, not to the heir of the testator. But where any issue of a testator takes under a devise, in remainder after other limitations, to "my own right heirs," and dies intestate, the descent is traced from the testator (sect. 4). As to whether the devisee could disclaim all interest under the will, but retain the estate as heir—a question of importance with respect to the amount of fine payable on admittance to copyholds—see *Bickley* v. *Bickley*, L. R. 4 Eq. 216; 36 L. J. Ch. 817.

Heir in by devise.

What words embrace realty—"estate," "property."

(*c*) Uncertainty as to the scope of expression descriptive of the subject of the gift is a frequent source of difficulty in the construction of wills. Sometimes the doubt is whether the terms embrace real as well as personal estate. The words "estate" and "property" clearly extend to and comprise realty. "Estate" in a will is *genus generalissimum*, and, of its own force, without any proof *aliunde*, carries realty as well as personalty; and is not to be confined to personalty only, unless a clear intention can be gathered from the whole will, or from the way in which the word is used in the particular part in question, *Mayor of Hamilton* v. *Hodsdon*, 6 Moo. P. C. 76; 11 Jur. 193; 79 R. R. 1. And where a testator devised and bequeathed all his "estate and effects" to A., to be paid, assigned, and transferred to him on his attaining twenty-one, it was held that copyholds of inheritance passed by the devise, notwithstanding the words of payment and transfer, which strictly were applicable only to personalty, *Stokes* v. *Salomons*, 9 Ha. 75; *D'Almaine* v. *Moseley*, 1 Drew. 629; 94 R. R. 782; *Phillips* v. *Beal*, 25 Be. 27; *Lloyd* v. *Lloyd*, L. R. 7 Eq. 458; 38 L. J. Ch. 458; 20 L. T. 898; *Kirby-Smith* v. *Parnell*, '03, 1 Ch. 483; 72 L. J. Ch. 468. But a different decision was given in *Coard* v. *Holderness*, 20 Be. 147, grounded on the special circumstances in that case. The words "I constitute A. and B. my residuary legatees," will not give them the testator's real estate, *Windus* v. *Windus*, 6 D. M. & G. 549; 26 L. J. Ch. 185; 106 R. R. 198; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; 50 L. J. Ch. 464; 44 L. T. 332; but the expression is not of invariable meaning, *Hughes* v. *Pritchard*, 6 Ch. D. 24; 46 L. J. Ch. 840; 37 L. T. 259; *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; *In re Gibbs*, '07, 1 Ch. 465; 76 L. J. Ch. 238; 94 L. T. 423. That the words "estate" and "property" may be restrained by the context, see *Timewell* v. *Perkins*, 2 Atk. 102; *Doe* v. *Rout*, 7 Tau. 79; 17 R. R. 448; *Doe* v. *Hurrell*, 5 B. & Al. 18; 24 R. R. 265; *Saunderson* v. *Dobson*, 16 L. J. N. S. Ex. 249.

"Estate and effects."

"Residuary legatees."

Restraining context.

What constitutes a restraining context can only be learnt by a minute examination of the cases, which will be found to present some very nice distinctions, particularly respecting the effect of the association, with the words "estate" and "property," of terms descriptive of personalty only, and of the introduction into the devise of trusts inapplicable to real estate. But the inclination of the present day is to hold lands to pass under words capable *per se* of comprehending them, in

**Notes to Prec. 5.**

spite of their association with words applicable only to personalty, see *Attree* v. *Attree*, L. R. 11 Eq. 280; 40 L. J. Ch. 192; 24 L. T. 121; *Smyth* v. *Smyth*, 8 Ch. D. 561; 38 L. T. 633. As the word "estate" or any other term of comprehensive import may be restrained to personalty by its more limited associates, so terms in themselves loose and ambiguous may be extended to real estate by force of the intention collected from the whole will, *i.e.* there may be an enlarging as well as a restraining context, *Wilce* v. *Wilce*, 7 Bing. 664; 33 R. R. 606; see the comments on this case in *Cook* v. *Jaggard*, L. R. 1 Ex. 125; 35 L. J. Ex. 76; 13 L. T. 717. Even the words "personal estates" have been held sufficient upon the context to pass realty, *Doe* v. *Tofield*, 11 Ea. 246; 10 R. R. 496. See also 1 Jarm. Wills, ch. 22.

Enlarging context.

If, owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself or from such extrinsic evidence as is admissible, which of these properties the testator referred to, the gift fails for uncertainty, as the Court cannot, to avoid an intestacy, construe the will as giving the legatee the option of electing which property he will take, *Asten* v. *Asten*, '94, 3 Ch. 260; 63 L. J. Ch. 834; 71 L. T. 228. As to right of selection see also *In re Cheadle*, '00, 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297.

The word "lands" will carry houses, unless both words occur in the will and stand in opposition. Thus, if a testator having a house and lands devises generally all his lands, the whole will pass; but if he devises his house to one, and his lands to another, the house of course will not pass under the latter devise, *Heydon's Will*, 2 And. 123. A devise of lands does not generally embrace incorporeal hereditaments, as tithes, rents, &c; but such hereditaments would pass under a devise of lands at a particular place, if the testator had no other property answering to that locality, *Rich* v. *Sanders*, Sty. 261. So a devise of a particular manor has been held to carry a rent issuing out of such manor, the testator having no other interest therein, *Inchley* v. *Robinson*, 2 Leon. 41, pl. 57. A devise of lands in such and such a county will, *semble*, pass money which is subject to a trust for investment in land in such county, *Re Duke of Cleveland's Settled Estates*, '93, 3 Ch. 244; 62 L. J. Ch. 955; 69 L. T. 735. See also *In re Glassington*, '06, 2 Ch. 305; 75 L. J. Ch. 670; 95 L. T. 100. To avoid such questions, it is advisable to use descriptive terms more comprehensive than the word "lands"—such as "tenements," "hereditaments," or "real estate." As to the meaning of "personal and landed estates," see *Hoare* v. *Byng*, 10 C. & F. 508; 59 R. R. 122.

Word "lands" comprises what.

There seems to be no material difference between the technical and popular signification of the word "messuage." Two acres of land situate four miles distant from a messuage have been held not to pass under the devise of a messuage *cum pertinentiis*, *Hearn* v. *Allen*, Cro. Car. 57. In another instance, a much larger quantity was adjudged to be included in a devise of "three messuages with all houses, stables, &c., that stand upon or belong to the said messuages," by reason, it would

"Messuage" comprises what.

**Notes to Prec. 5.**

seem, of the land having been conveyed to the testator by the description of a messuage or tenement, with the appurtenances, *Gulliver* v. *Poyntz*, 2 W. Bl. 726; but the case is not to be relied on, the evidence being clearly inadmissible to affect the construction. In another case, the devise of a house was held to carry land employed by the testator to raise hay and corn for his own consumption, because he had directed that the devisee should be at the charge of housekeeping, servants' wages, and coach horses; these horses were used to plough the land in question, and the Court considered the testator as having directed that they should continue to be so used; but in the will, as stated, there is no such direction, *Blackborn* v. *Edgley*, 1 P. W. 600. In *Heach* v. *Pritchard*, W. N. 1882, p. 140, a devise of "my cottage and garden" included an adjoining orchard.

"Premises," how construed.

The word "premises" signifies what has gone before, and therefore may, with propriety, be used in relation to any preceding subject or subjects. Thus, where a testator devised a certain messuage and the furniture in it to A. for life, and after his decease he gave the said messuage and premises to B., the latter gift was held to carry the furniture as well as the messuage to B., *Sanford* v. *Irby*, 4 L. J. Ch. 23. See also *Doe* v. *Meakin*, 1 Ea. 456; 6 R. R. 324; *Fitzgerald* v. *Field*, 1 Rus. 427; 25 R. R. 97; *Lethbridge* v. *Lethbridge*, 3 D. F. & J. 523; 4 D. F. & J. 35; *Hibon* v. *Hibon*, 1 N. R. 532.

"Share."

Questions often arise whether the word "share," or other such term, applies to one, or more than one, of several preceding subjects of gift: as to which, see *Doe* v. *Stopford*, 5 Ea. 501; *Hardman* v. *Johnson*, 3 Mer. 347; 17 R. R. 95; *Doe* v. *Gell*, 2 B. & C. 680; *Doe* v. *Bowling*, 5 B. & Al. 722; *Adshead* v. *Willetts*, 29 Be. 358.

A testator bequeathed "twenty Northern Bank shares" to a legatee. At the date of his death the testator possessed fifty-one "A" Northern Bank shares of the value of 26*l.* each, and seventy-two "B" shares of the value of 13*l.* each. It was held that the legatee was entitled to select twenty of the "A" shares as constituting the legacy, *O'Donnell* v. *Welsh*, '03, 1 Ir. R. 115.

"In or near a place."

Local indefiniteness is always to be avoided, such as devising lands in or near a place. A devisee of "all my estates in or near Latchington, near Maldon," was held not to include a close which was from four to six miles from L., and was in the town of Maldon, *Doe* v. *Pigott*, 7 Tau. 553. In applying this and every other term of description, local or otherwise, property to which the words might have been stretched for want of a more appropriate subject will be excluded by the existence of one more nearly answering to the term in question, *Doe* v. *Bower*, 3 B. & Ad. 453; *Webber* v. *Stanley*, 16 C. B. N. S. 698; *Smith* v. *Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11; 13 L. T. 561; *Pedley* v. *Dodds*, L. R. 2 Eq. 819; 14 L. T. 823. A devise of "my freehold property at Masbrough" (in the parish of Rotherham) did not pass property at Rotherham, though the testator never had any at Masbrough, *Barber* v. *Wood*, 4 Ch. D. 885; 46 L. J. Ch. 728; 36 L. T. 373.

**Notes to Prec. 5.**

Though a testator may show by the context of his will that he uses a local appellation in a peculiar and extraordinary sense, yet this conclusion will not be adopted upon slight or equivocal grounds, *Doe* v. *Johnson*, 5 Nev. & M. 281.

Peculiar construction of words of local description rejected.

In devising a property by name, uncertainty is sometimes produced by describing it to be in the occupation of a person whose occupancy embraces less than the whole. In such a case, the reference to occupancy is not generally restrictive, *Goodtitle* v. *Southern*, 1 M. & S. 299; 14 R. R. 435; *Down* v. *Down*, 7 Tau. 343; 18 R. R. 495; *Doe* v. *Carpenter*, 16 Q. B. 181.

As to reference to occupancy.

Words of suggestion and affirmation not restrictive.

Indeed, it may be stated, as a general rule, that words of suggestion or affirmation, added to a definite description, are not restrictive. As where a testatrix having devised all that her Briton Ferry estate, with all the manors, &c. thereunto belonging, afterwards, when describing another estate, added, "which, as well as my Briton Ferry estate, is situate in the county of Glamorgan;" part of the Briton Ferry estate was in Breconshire; but it was held that the words in question did not exclude from the devise the Breconshire portion of the estate, *Doe* v. *Earl of Jersey*, 1 B. & Al. 550; 19 R. R. 380. So, where a testator devised all his lands at S., which were given him by his brother's will, it was held that the devise was not confined to what he took by his brother's will, *Welby* v. *Welby*, 2 V. & B. 191; 13 R. R. 58. In *Travers* v. *Blundell*, 6 Ch. D. 436; 36 L. T. 341, an appointment was not limited by an incomplete enumeration of closes of land. And where a testatrix devised all her interest in the lands known by the name of D., situate in the parish of K., and in the occupation of E., it was held that the devise included closes in the parish of L., and a close situate in the parish of K., but occupied by M., *Hardwick* v. *Hardwick*, L. R. 16 Eq. 168; 42 L. J. Ch. 636. In this case Lord Selborne stated these two rules:— 1. If all the terms of description fit some particular property, they cannot be enlarged by extrinsic evidence, so as to include anything which any part of those terms does not accurately fit. 2. If the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is subordinate matter, and for this purpose evidence of extrinsic facts may be regarded. In *In re Bright-Smith*, 31 Ch. D. 314; 55 L. J. Ch. 365; 54 L. T. 47, where a testator devised his "freehold" farm and land situate at E., and now in the occupation of J. B., and the farm comprised about 76 acres, of which 26 were copyhold, the word "freehold" was held to be only the subordinate description, and the whole farm passed under the devise. In this case there was no residuary devise, so that, if the copyhold portion had been held to be excluded, there would have been an intestacy, which the Court always leans against. Although the absence of a residuary devise sufficed to distinguish this case from *Hall* v. *Fisher*, 1 Coll. 47; 66 R. R. 14;

**Notes to Prec. 5.**

and *Stone* v. *Greening*, 13 Sim. 390, Chitty, J., questioned these decisions. See also *Whitfield* v. *Langdale*, 1 Ch. D. 61; 45 L. J. Ch. 177; 33 L. T. 592. A devise of "freeholds" will include "customary freeholds," unless there is reason to suppose that the testator has used the term "freehold" in its strict and technical sense, *In re Steel*, '03, 1 Ch. 135; 72 L. J. Ch. 42; 87 L. T. 548. A gift of "all my Bank stock and foreign securities," was held not to be narrowed by the addition of the words "as invested by L., broker," *Drake* v. *Martin*, 23 Be. 89, and the words "my property not in England, in the hands of my attorney W., consisting of, &c.," passed all the property abroad (*ib.*).

As to reference to locality only.

It would seem that where the property is described by a reference to its locality only, and not by name, as where a testator devises all his messuages, lands, &c., at A. in his own occupation, the devise will not extend to a messuage and piece of land at A. not in his own occupation, there being a house and land at A. exactly answering to the description, *Doe* v. *Parkin*, 5 Tau. 321; 15 R. R. 515; see also *Doe* v. *Ashley*, 10 Q. B. 663; 74 R. R. 472; *Doe* v. *Hubbard*, 15 Q. B. 227; *Homer* v. *Homer*, 8 Ch. D. 758. Sometimes the occupancy, being more comprehensive than any other particular in the description, has the effect of enlarging instead of restricting the extent of a devise, *Press* v. *Parker*, 2 Bing. 456; 27 R. R. 687. Where a testator devised an estate called D. "as now enjoyed by me," the devise was held to include closes belonging to an adjoining estate, which the testator had added to D. by removing the fences, and which were then in his occupation, *Bodenham* v. *Pritchard*, 1 B. & C. 350; 25 R. R. 405. So, under a devise of "the house I live in and garden," stables and a yard in a ring-fence, and a coal-pen on the opposite side of the road, which were used by the testator partly for domestic purposes and partly in trade, were held to pass, *Doe* v. *Collins*, 2 T. R. 498; 1 R. R. 529. See also *Hibon* v. *Hibon*, 1 N. R. 532. In *In re Seal*, '94, 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329, the devise was of "my residence called S. House, and premises thereto, as the same are now occupied by me." Some years before making this devise, testator had let to two of his sons, for the purposes of their business, an office standing in the yard of S. House, and the stable and coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house, and the sons were in occupation till testator's death. *Held* (C. A.), that the devise included the room over the coach-house, but did not include the rest of the coach-house and stable nor the office, for that the property which was in the testator's own occupation answered the whole of the description, and that being so the Court could not enter into the question of inconvenience, and reject the reference to occupation as *falsa demonstratio*. But a devise of "my capital messuage or mansion-house wherein I now live, and the buildings, gardens, grounds, and appurtenances to the same belonging, or therewith used," has been decided not to comprise cottages on the opposite side of a road, and in the occupation of tenants, though the testatrix was in the habit

Reference to occupancy.

**Notes to Prec. 5.**

of using the space between two of the cottages for turning her carriage, *Hougham* v. *Sandys*, 2 Sim. at p. 151. See also *Josh* v. *Josh*, 5 Jur. N. S. 225. A devise of a manor with the lands "thereunto belonging" was partly, by the aid of the context, extended to lands not properly parcel of the manor, though in a popular sense situate within the manor, *Doe* v. *Langton*, 2 B. & Ad. 680. But under a devise of lands "in the parish of C., with their appurtenances," outlying pieces in other parishes, though held with the C. lands, did not pass, *Evans* v. *Angell*, 26 Be. 202. A mansion with 166 acres of land was held to pass by a devise of "all my estate in Shropshire called Ashford Hall," *Ricketts* v. *Turquand*, 1 H. L. C. 472, where parol evidence was admitted to show what the testator had been accustomed to consider the Ashford Hall estate.

"Goods," &c., in or about a house.

Personal chattels are sometimes described by a reference to locality, as where a testator bequeaths the "household goods," "things," "property," or "effects," which are in and about his place of residence. See note (*b*), Prec. XV. A gift of "goods," "chattels," or "effects" in or about a house, will in general pass cash (including notes payable on demand, which are considered as cash), but not *choses in action*, such as securities for money, these being only the evidence of title to property situated elsewhere, *Green* v. *Symonds*, 1 Bro. C. C. 129, n.; *Moore* v. *Moore*, *ib.* 127; *Fleming* v. *Brook*, 1 Sch. & Lef. 318; 9 R. R. 35; *Brooke* v. *Turner*, 7 Sim. 671; 40 R. R. 218; *Jones* v. *Lord Sefton*, 4 Ves. 166; *Stuart* v. *Marquis of Bute*, 11 Ves. 657, 662; 14 R. R. 14; *Marquis of Hertford* v. *Lord Lowther*, 7 Be. 1; 64 R. R. 1; *Collier* v. *Squire*, 3 Rus. 467; 27 R. R. 112; *Swinfen* v. *Swinfen*, 29 Be. 207; 2 Wms. Exors. 1040. But see *Gibbs* v. *Lawrence*, 9 W. R. 93; *Roberts* v. *Kuffin*, 2 Atk. 112. In *Hall* v. *Hall*, '92, 1 Ch. 361; 61 L. J. Ch. 289; 66 L. T. 206, the context showed that "effects" included real estate. Under a gift of "furniture, goods and chattels," in testator's house, only chattels *ejusdem generis* as furniture passed, such in fact as would, if the house had been let as a furnished house, have passed to a tenant taking the house, and not such articles as jewellery, gems, or scientific instruments, *Manton* v. *Tabois*, 30 Ch. D. 92; 54 L. J. Ch. 1008; 53 L. T. 289. See also *In re Seton-Smith*, '02, 1 Ch. 717; 71 L. J. Ch. 386; 86 L. T. 322. Where a testator gave "half my property at Rothschild's Bank," *choses in action* were held to pass to the legatee, *In re Prater*, 37 Ch. D. 481; 57 L. J. Ch. 342; 58 L. T. 784; and where the gift was of a desk, "with the contents thereof," *choses in action* found therein, such as a cheque to the order of the testator, but unindorsed, promissory notes payable to the testator or order, and also unindorsed, and a promissory note payable on demand, passed to the legatee. The desk also contained the key of a security box, and it was held that the key gave no title to the contents of the box, this box not being itself in the desk, *In re Robson*, '91, 2 Ch. 559; 60 L. J. Ch. 851; 65 L. T. 173. In this case Chitty, J., remarked on the risk run in making bequests of this nature. Under a bequest of "property," or "all my estate and effects," described as being in a

**Notes to Prec. 5.**

certain locality, debts due from persons in that locality to the testator will be included, *Nisbett* v. *Murray*, 5 Ves. 149; 5 R. R. 6; *Arnold* v. *Arnold*, 2 M. & K. 365; 39 R. R. 222; *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613; *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52 L. J. Ch. 165; 47 L. T. 614; *In re Clark*, '04, 1 Ch. 294; 73 L. J. Ch. 188; 89 L. T. 736. A gift of a "house and its contents" does not, as a general rule, pass things which are evidence of property outside the house, *e.g.* title deeds to land or stock and share certificates, *In re Craven*, 99 L. T. 390.

Exception from bequest.

But if a testator expressly accepts any particulars to which the bequest would not otherwise have extended, such exception will have the effect of enlarging the construction, see *Hotham* v. *Sutton*, 15 Ves. 319; 10 R. R. 83. And if in a general devise or bequest the testator introduces an exception of uncertain extent, the effect of such uncertainty is merely to neutralise the exception, and not to invalidate the disposition containing it, *Blundell* v. *Gladstone*, 14 Sim. 83.

"Chattels and effects."

A bequest of "chattels and effects" standing alone and unrestricted is clearly adequate to pass the whole personal estate, *Kendall* v. *Kendall*, 4 Russ. 370; 28 R. R. 125; yet, where these words are collocated with household goods, they may be and frequently are restrained to articles *ejusdem generis*, *Woolcombe* v. *Woolcombe*, 3 P. W. 112; *Timewell* v. *Perkins*, 2 Atk. 102; *Porter* v. *Tournay*, 3 Ves. 311; *Rawlings* v. *Jennings*, 13 Ves. 39; 9 R. R. 137; *Sutton* v. *Sharp*, 1 Russ. 146; 25 R. R. 19. And where a testator gave his household furniture, books, pictures, engravings, plate, linen, china, and other effects to two persons in equal shares, it was held that the word "effects" ought to be limited to things of the same kind as those previously enumerated, and that articles of jewellery could not fall under that description, *In re Hammersley*, 81 L. T. 150. See also *In b. O'Loughlin*, L. R. 2 P. & D. 102; 39 L. J. P. 53. But in *Gover* v. *Davis*, 29 Be. 222; *Nugee* v. *Chapman*, *ib.* 291; and *Hodgson* v. *Jex*, 2 Ch. D. 122; 45 L. J. Ch. 388, property not *ejusdum generis* was held to be included. Again, the word "effects," though *primâ facie* comprising only personalty (Hawkins, Constr. Wills, 55), has been held on the context to pass real estate, *Milsome* v. *Long*, 3 Jur. N. S. 1073; see also *Smyth* v. *Smyth*, 8 Ch. D. 561; 38 L. T. 633; *Doe* v. *Tofield*, 11 Ea. 246; 10 R. R. 496. See further as to the force and extent of particular words of description, 1 Jarm. Wills, ch. 24.

(*d*) See note (*a*), Prec. XVI.

As to the modes of providing for the payment of annuities.

(*e*) There are two ordinary modes of providing for the payment of annuities not charged on any specific property. One is, by directing the executors to invest an adequate sum in the purchase of stock or some other security yielding income, until the decease of the annuitant, when the fund falls into the residue; and the other by directing an annuity to be purchased, as in the text. The former is the more usual, and is, in general, the more eligible mode. It has the effect, however, of absorbing presently a larger portion of the capital to provide for the annuity, and is attended with this (sometimes inconvenient) consequence, that it

**Notes to Prec. 5.**

protracts the final distribution of the residuary personal estate until the expiration of the annuity; so that, where the testator is desirous that as large a portion of income as possible shall be immediately available for the general trusts, or where (as in the present instance) the residue is disposed of in such a manner as, independently of the annuity, to admit of a speedy distribution, it seems advisable to authorise the executors to purchase the annuity. This is, in fact, equivalent to leaving the annuitant a legacy equal in amount to the estimated value of his annuity; for the annuitant (or, if the purchase be not made in his lifetime, his personal representative) can elect to receive the value, *Dawson* v. *Hearn*, 1 R. & M. 606; *Woodmeston* v. *Walker*, 2 R. & M. 197; 34 R. R. 56; *Barnes* v. *Rowley*, 3 Ves. 305; *Re Browne's Will*, 27 Be. 324. Where the testator gives an annuity as from a certain future date, and the legatee dies before that date, the annuity sinks for the benefit of the testator's estate, and nothing passes to the legatee's personal representatives, *Power* v. *Hayne*, L. R. 8 Eq. 262; *In re Draper*, 57 L. J. Ch. 942; 58 L. T. 942; in which case *Day* v. *Day*, 1 Drew. 569; 22 L. J. Ch. 878; 94 R. R. 833, was not followed. See also *In re Mabbett*, '91, 1 Ch. 707; 60 L. J. Ch. 279; 64 L. T. 447, and *In re Robbins*, '07, 2 Ch. 8; 76 L. J. Ch. 531; 96 L. T. 755. But see *Bayley* v. *Bishop*, 9 Ves. 6; 7 R. R. 132. An express declaration in the will that the annuitant shall not be allowed to have the value in lieu of the annuity, if standing alone, is inoperative, *Stokes* v. *Cheek*, 28 Be. 620; for such a prohibition would not prevent the annuitant from selling or incumbering the annuity as soon as it was purchased, and it would be idle to make a purchase of that which the annuitant could immediately afterwards resell; the subsequent declaration in the text, as to cesser, is therefore necessary, *Hatton* v. *May*, 3 Ch. D. 148. But where a testator has covenanted to pay a life annuity, it does not follow, if after the death of the testator his estate is sufficient and the payments are made, that the annuitant is entitled to require a portion of the estate to be sold for the purpose of having the value of the annuity paid, *Yates* v. *Yates*, 28 Be. 637. As to the power of the Court, in the absence of any special direction in the will, to set apart out of the residuary estate a sufficient sum to answer the annuity, see *Harbin* v. *Masterman*, '96, 1 Ch. 351; 65 L. J. Ch. 195; 73 L. T. 591.

(*f*) As to the words "residue," "surplus," "rest and residue," "remaining property," "what is left," see *Bebb* v. *Penoyre*, 11 Ea. 160; *Mayor of South Molton* v. *Attorney-General*, 5 H. L. C. 1; 23 L. J. Ch. 567; 101 R. R. 1; *Presant* v. *Goodwin*, 1 Sw. & Tr. 544; 29 L. J. P. 115; 2 L. T. 57; *Attree* v. *Attree*, L. R. 11 Eq. 280; 40 L. J. Ch. 192; 24 L. T. 121; *Smyth* v. *Smyth*, 8 Ch. D. 561; 38 L. T. 633; *In re Willatts*, '05, 2 Ch. 135; 74 L. J. Ch. 564; 93 L. T. 256; and as to a bequest of "money which may remain after payment of my debts," see *Stocks* v. *Barré*, Joh. 54. For an instance of a constructive gift of residue, see *Hodgkinson* v. *Barrow*, 2 Ph. 578; 17 L. J. Ch. 131; 78 R. R. 200; *In re Johnson*, 92 L. T. 357; and for a case where the words

Residue to elder son.

Residue.

**Notes to Prec. 5.**

"residue of my things" were held, under the circumstances, not to comprise the whole of the testator's property, *In b. Ludlow*, 1 Sw. & Tr. 29; 27 L. J. P. 7. As to the effect of exceptions in a residuary bequest, see *West* v. *Laking*, 12 Jur. 129; *Blight* v. *Hartnoll*, 23 Ch. D. 218; 52 L. J. Ch. 672; 48 L. T. 543; *In re Fraser*, '04, 1 Ch. 726; 73 L. J. Ch. 481; 91 L. T. 48. As to whether a bequest is residuary or specific, see *Sargent* v. *Roberts*, 12 Jur. 429; 17 L. J. Ch. 117; 80 R. R. 174; *Clarke* v. *Butler*, 1 Mer. 304; 15 R. R. 118; *Re Kendall's Trusts*, 14 Be. 608; 92 R. R. 254; *Fitzwilliams* v. *Kelly*, 10 Ha. 275; *Fielding* v. *Preston*, 1 De G. & J. 443; *Broadbent* v. *Barrow*, 8 App. Cas. 812; *In re Green*, 40 Ch. D. 610; 58 L. J. Ch. 157; 60 L. T. 225. As to the effect of the Wills Act upon a general devise, see *ante*, pp. 64 *et seq.*

Residuary or specific.

Intermediate income.

A general residuary bequest, though contingent, carries with it the intermediate income, which does not go to the next of kin, but accumulates until the determination of the contingency, *Green* v. *Ekins*, 2 Atk. 473; *Trevanion* v. *Vivian*, 2 Ves. S. 429. See *In re Taylor*, '01, 2 Ch. 134; 70 L. J. Ch. 535; 84 L. T. 758. And a gift of real and personal estate, blended, though contingent in terms, carries the intermediate rents of the realty as well as the income of the personalty, and consequently the *interim* rents of the real estate, as well as the *interim* income of the personalty, must be accumulated until the happening of the contingency, and will follow the destination of the *corpus*. To constitute a blending of the real and personal estate, it is not necessary that both should be given together on one page of the will. If the will shows an intention on the testator's part to effect a blending, this is enough, *Genery* v. *Fitzgerald*, Jac. 468; 23 R. R. 121; *In re Dumble*, 23 Ch. D. 360; 48 L. T. 661; *In re Burton's Will*, '92, 2 Ch. 38; 61 L. J. Ch. 702; 67 L. T. 221. But the intermediate income arising from a specific bequest does not pass to the legatee until the period of vesting, and, pending the vesting, falls into the residuary personalty, *Wyndham* v. *Wyndham*, 3 Br. C. 58; *Hodgson* v. *Earl of Bective*, 1 H. & M. 376; 10 H. L. C. 656; *Holmes* v. *Prescott*, 3 N. R. 559; *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52 L. J. Ch. 165; 47 L. T. 614; and is regarded as undisposed-of income merely, as between the parties entitled to the residue, *Fullerton* v. *Martin*, 1 Dr. & S. 31; *Edmunds* v. *Waugh*, 2 N. R. 408; unless the specific bequest be segregated and vested in trustees for the benefit of the object of the gift when the contingency happens, within the principle of *Re Medlock*, 55 L. J. Ch. 738; 54 L. T. 828; *Re Clements*, '94, 1 Ch. 655; 63 L. J. Ch. 326; 70 L. T. 682; *Re Woodin*, '95, 2 Ch. 309; 64 L. J. Ch. 501; 72 L. T. 740. And a power to the trustees to apply the whole, or such part as they may think fit, of the income, before vesting, for the maintenance of those in whom, if they live long enough, the legacy will vest, will not operate to vest the legacy, *Re Wintle*, '96, 2 Ch. 711; 65 L. J. Ch. 863; 75 L. T. 207. See also *In re Turney*, '99, 2 Ch. 739; 69 L. J. Ch. 1; 81 L. T. 548. But see *Long* v. *Ovenden*, 16 Ch. D. 691; 50 L. J. Ch. 314; 44 L. T. 462, as to the intermediate income of a fund appointed on a contingency. An executory

Personalty and realty blended.

Specific bequest.

Realty only.

**Notes to Prec. 5.**

devise of real estate alone, which does not take effect until the happening of some contingency, does not carry with it the intermediate rents, but the same, being undisposed of, belong to the heir-at-law, *Hopkins* v. *Hopkins*, Ca. t. Talb. 44; *Hodgson* v. *Earl of Bective*, 1 H. & M. 376; *Countess of Bective* v. *Hodgson*, 10 H. L. C. 656; and see *Re Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. Ch. 316; 24 L. T. 223; *Wade-Gery* v. *Handley*, 3 Ch. D. 374; 45 L. J. Ch. 712; 35 L. T. 85; *Astley* v. *Micklethwaite*, 15 Ch. D. 66; 49 L. J. Ch. 672; 43 L. T. 58.

Posthumous heir.

In *Goodale* v. *Gawthorne*, 2 S. & G. 375; 23 L. J. Ch. 878, it was held that the rents of real estate becoming due between the death of an intestate and the birth of his posthumous heir, which rents were not actually received by the presumptive heir before the birth of the posthumous heir, belonged on his birth to the latter. But in *Richards* v. *Richards*, Joh. 754, V.-C. Wood declined to follow *Goodale* v. *Gawthorne*, and held that a posthumous heir is entitled to the rents of a descended estate only from his birth, whether the intermediate rents have or have not been actually received by the presumptive heir. And where there was a devise to trustees, to the use of the first and other sons of M. in tail male, with a residuary devise, the residuary devisee was held entitled to the intermediate rents from the testator's death to the birth of a tenant in tail, *Re Mowlem*, L. R. 18 Eq. 9; 43 L. J. Ch. 353.

(*g*) See note (*g*), Prec. XII.

**Prec. 6.**

## No. VI.

WILL *of a* MARRIED MAN, *giving the Income of his Property to his Wife during Widowhood; subject thereto, the Capital equally among his Children, the Children of a deceased Child taking their Parent's Share.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*] I REVOKE all testamentary instruments heretofore executed by me and I APPOINT —— and —— executors and trustees of this my will I BEQUEATH to my wife [*name*] all the household furniture plate linen china glass books pictures prints provisions and other household effects belonging to me at the time of my death and a legacy of £—— to be paid to her out of the first moneys coming to the hands of my executors AND as to all the rest of my estate and effects both real and personal I devise and bequeath the same unto and to the use of the said —— and —— their heirs executors administrators and assigns (*a*) Upon trust to sell call in and convert into money my real and residuary personal estate And upon further trust to invest the money arising from the sale calling in and conversion thereof in the names or name of the trustees or trustee for the time being of this my will (*b*) And to pay the annual income of such investments to my wife during her life if she shall so long continue my widow And from and after her death or marriage again as to the capital and income of the same investments Upon trust for my children in equal shares the respective shares of such children to be absolutely vested on my death (*c*) Provided that if any child of mine shall die in my lifetime leaving issue who shall survive me and who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken of

Household effects to wife.

Real and residue of personal estate to trustees.

Upon trust to sell;

—and invest the proceeds;

—to pay income to wife during widowhood;

—on her death or marriage capital equally among children;

—issue of deceased child taking parent's share.

and in any residuary estate if such parent had lived to attain a vested interest (*d*) I DECLARE that the trustees or trustee for the time being of this my will shall have a discretionary power to postpone for such period as to them or him shall seem expedient the sale calling in or conversion of any parts of my real or personal estate but the unsold real estate and the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the investments aforesaid and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts and the unsold real estate shall be deemed to be converted as from the time of my death and be transmissible as personal estate accordingly I DECLARE that if at any time or times during the widowhood of my wife the annual income of my estate shall be less than £—— it shall be lawful for the trustees or trustee for the time being of this my will to raise out of the capital thereof and pay to my widow such a sum as will make her income up to £—— a year (*e*) I DECLARE that so long as my wife lives and continues unmarried the power of appointing new trustees conferred by statute shall be exerciseable by her (*f*) IN WITNESS &c.

Power to postpone conversion.

Widow's income to be made up to a certain sum.

New trustees.

**NOTES to Precedent VI.**

(*a*) If the testator is possessed of copyhold property, it should not be devised to the executors upon trust for sale, but the executors should be given power to sell it. See note to Prec. V., *ante*, p. 159. In such a case the following form might be adopted:—

"As to all my copyhold property I direct my executors to sell the same as soon as conveniently may be after my decease and to hold the proceeds of such sale upon the same trusts as are hereinafter declared concerning the moneys to arise from the sale of the residue of my real and personal estate and as to all the rest of my estate and effects" [continue as in precedent].

(*b*) See note (*b*), Prec. IV.

(*c*) This form of gift to children is only appropriate to cases where all the testator's children have attained twenty-one years of age at the date when the will is made.

If the children have not all attained that age, the following form should be adopted:—

"Upon trust for such of my children as shall survive me and being sons or a son shall have attained or shall attain the age of twenty-one years and being daughters or a daughter shall have attained or shall

**Notes to Prec. 6.**

attain that age or shall have married or shall marry under that age and if there shall be only one such child then upon trust for such child."

(*d*) If the gift is to such children only as being sons or a son attain twenty-one, or being daughters or a daughter attain that age or marry, according to the form given in note (*c*), the substitutional gift will be in the following terms:—

"Provided that if any son or daughter of mine shall die in my lifetime or if any son of mine shall survive me but die before attaining the age of twenty-one years and in either of such cases any such son or daughter so dying shall leave issue who shall survive me and if male attain the age of twenty-one years or if female attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken in my residuary estate if such parent had survived me and attained a vested interest therein."

This form meets the case of a son who survives the testator and marries but dies under twenty-one years of age leaving issue.

(*e*) Great care should be taken in adopting this clause, which is only suitable to special cases. If the testator's circumstances were to change for the worse between the date of the will and his death, the insertion of such a clause might operate to exhaust the whole estate during the lifetime of the widow.

(*f*) The statutory power of appointing new trustees referred to in the above precedent is that conferred by the Trustee Act, 1893 (56 & 57 Vict. c. 53), which contains provisions (sects. 10, 11, and 12) superseding and replacing the corresponding provisions of the Conveyancing Acts, 1881 and 1882. Sects. 10, 11, and 12 of the Trustee Act, 1893, are as follows:—

Power of appointing new trustees.

Sect. 10.—"(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2.) On the appointment of a new trustee for the whole or any part of trust property—

(a) the number of trustees may be increased; and

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any

Notes to Prec. 6.

other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6.) This section applies to trusts created either before or after the commencement of this Act."

Retirement of trustee.

Sect. 11.—"(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other persons, if any, as is empowered to appoint trustees by deed consent to the discharge of the trustee and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

**Notes to Prec. 6.**

(4.) This section applies to trusts created either before or after the commencement of this Act."

Sect. 12.—"(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who, by virtue of the deed, become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting of trust property in new or continuing trustees.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the 31st of December, 1881."

Many points of difficulty and much expense connected with the appointment of new trustees will be avoided whenever advantage is taken of the Public Trustee Act, 1906 (6 Edw. VII., c. 55). The public trustee is a corporation sole with perpetual succession, who entered upon his public duties in 1908. If a testator is desirous of engaging the services of the public trustee, he should nominate him in his will or codicil as follows, "I appoint the Public Trustee to be the executor and trustee of this my will." Full information is obtainable as to the trustee on application at the office of his department, 3 and 4, Clement's Inn, W.C., or at any post office.

## No. VII. (*a*).

WILL *of a* MARRIED MAN *leaving all his property to Trustees for Sale and Conversion, to pay Debts and Legacies and to invest the Surplus; Income to Wife during Widowhood, charged with Maintenance of Children; Capital among Children equally at twenty-one or Marriage.—Settlement of Shares of Daughters.—Provision for Advancement of Children.—Substitution of Grandchildren for Children dying before Testator.—On Failure of previous Trusts, as Wife shall appoint; in Default for Testator's Next of Kin.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I REVOKE all prior wills and codicils and appoint —— and —— executors and trustees hereof I BEQUEATH the following legacies that is to say To &c. (*b*) I DEVISE unto and to the use of my said trustees [*names*] in fee simple all the real estate and I bequeath to them all the personal estate of or to which I shall be seised (*c*) possessed or entitled at my decease upon the trusts and subject to the declarations following that is to say UPON TRUST to sell (*d*) and convert into money my said estates or such parts thereof as shall be of a saleable or convertible nature and to get in the other parts thereof AND I empower my said trustees to suspend for such period as they shall judge expedient the sale conversion or getting in of my said estates or any part or parts thereof respectively and during the suspense of the sale conversion or getting in to manage and order all the affairs thereof as regards letting occupation cultivation repairs insurance against fire receipt of rents indulgences and allowances to tenants and all other matters but so that no lease shall be granted otherwise than from year to year or for a term not exceeding twenty-one years in possession at the most improved rent without fine or premium (*e*) AND I DECLARE that for the purposes of enjoyment and transmission under the trusts

Appointment of executors.

Real and personal estate to trustees;

—sale and conversion;

—discretionary power to postpone conversion;

—interim management;

—constructive conversion from

**Prec. 7.**

testator's death; rents, &c., to be deemed income.

hereinafter contained my said estates shall be considered as money from the time of my death and the rents dividends interest and other yearly produce thereof respectively to accrue due after my death and until the actual sale conversion and getting in thereof shall be deemed the annual income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the nature of the property or investments yielding the same AND as to the moneys to arise from the sale conversion and getting in of my said estates and my moneys of which I may be possessed I direct my said trustees thereout in the first place to pay or retain all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses and in the next place to pay the pecuniary legacies hereinbefore bequeathed AND to invest the ultimate surplus of the said trust moneys (*f*) with power from time to time with the consent in writing of my wife until she shall die or marry and afterwards in the discretion of my said trustees to vary such investment or investments AND I FURTHER direct my said trustees to stand possessed of my said trust moneys or the stocks funds and securities whereon the same shall be invested as aforesaid (which moneys stocks funds and securities are hereinafter referred to under the denomination of "the said trust fund") UPON TRUST to pay the annual income thereof to my wife during her life if she shall so long continue my widow she thereout maintaining educating and bringing up in a manner suitable to their station in life such of my sons as shall for the time being be under the age of twenty-one years and such of my daughters as shall for the time being be under that age not having been married AND immediately after the death or future marriage of my wife as to as well the capital as the income of the said trust fund IN TRUST for my child if only one or all my children if more than one who either before or after the death or future marriage of my wife shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married and if more than one in equal shares BUT I declare that if such child or children or any of them shall be a daughter or daughters then the said trust fund or

Trusts of proceeds;

—expenses, debts, and legacies;

—investment of ultimate surplus;

—income to wife during her widowhood;

—charged with maintenance, &c., of children;

—capital to children equally.

Settlement of the shares of daughters;

**Prec. 7.**

the share thereof to which such daughter or each of such daughters shall become entitled shall be held by my said trustees upon the trusts following namely UPON TRUST with the consent in writing of my daughter entitled thereto and after her death in the discretion of my said trustees to convert the same into money and invest the moneys to arise therefrom with power from time to time with the like consent or in the like discretion to vary such investment or investments AND upon further trust to pay the annual income of the same moneys or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund") as and when the same shall from time to time become actually receivable and not by way of anticipation into the hands of my same daughter during her life for her separate use AND immediately after the death of my same daughter as to as well the capital of the said settled fund as the income thenceforth to accrue due for the same IN TRUST for all or any of the children and remoter issue of my same daughter (such remoter issue being born in her lifetime) in such proportions for such interests and generally in such manner as she whether covert or sole shall from time to time by deed with or without power of revocation and new appointment or by her will appoint BUT no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot AND in default of appointment and subject to any partial appointment IN TRUST for the child if only one or all the children if more than one of my same daughter who either before or after her death shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares (*y*) AND if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then IN TRUST for such persons for such interests and generally in such manner in all respects as my same daughter shall by will

—investment;

—inalienable life interest;

—children and other issue of daughter as she shall appoint;

—hotchpot;

—in default, for children equally at twenty-one or marriage;

—if no child attain twenty-one or marry,

—as daughter shall by will appoint;

**Prec. 7.**

—in default for daughter's next of kin;

—advancement of testator's children irrespective of minority.

Substitution of grandchildren for children of testator predeceasing him.

On failure of previous trusts;

—as testator's wife shall by will appoint;

—for testator's next of kin.

appoint AND in default of appointment and subject to any partial appointment IN TRUST for the person or persons who at the death of my same daughter shall be of her blood and of kin to her and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she were dead a spinster and intestate such persons if more than one to take in the proportions prescribed by the same statutes I EMPOWER my said trustees with the consent of my wife during her widowhood and after her decease or marriage in their discretion and notwithstanding any of the trusts hereinbefore declared of the said trust fund to apply any part or parts not exceeding in the whole one moiety of the capital of the fund or share to which each or any child of mine shall be entitled or contingently entitled in or towards the advancement in life or otherwise for the benefit of the same child whether such child shall be a son or daughter or shall be under the age of twenty-one years or not I DECLARE that if any son or daughter of mine shall die in my lifetime or if any son of mine shall survive me but die before attaining the age of twenty-one years and any such son or daughter shall leave issue who shall survive me and being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken in my residuary estate if he or she had survived me and lived to attain a vested interest therein AND in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust fund by virtue of my will then I direct my said trustees to hold the same fund IN TRUST for such persons for such interests and generally in such manner as my wife she continuing my widow at her death shall by her will appoint AND in default of such appointment or subject to any partial appointment IN TRUST for the person or persons who at the death or future marriage of my wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal effects of intestates would be entitled to my personal estate if I were to die intestate immediately after the death or marriage of my widow such persons if more than one to take in the

proportions prescribed by the same statutes And lastly I appoint after the death or future marriage of my wife the said —— and —— or the survivor of them to be the guardians or guardian of my children during their respective minorities (*h*) In witness &c.

**Prec. 7.**

Appointment of guardians.

**NOTES to Precedent VII.**

(*a*) See note (*k*), Prec. VIII.

(*b*) If a testator should be possessed of copyhold property, refer to note to last precedent.

(*c*) Seised is a technical word, and in the absence of a qualifying context is construed according to its technical meaning. Thus, a testator devised all real estate of which he might die seised; lands to which he was lawfully entitled, but which were in the wrongful possession of strangers, the testator having no "seisin" either at law or in fact, did not pass by the devise, *Leach* v. *Jay*, 9 Ch. D. 42; 47 L. J. Ch. 876; 39 L. T. 242.

(*d*) It will be noticed that the trusts for sale in the precedents contained in this volume are almost invariably given in the infinitive mood, "Upon trust to sell," thereby avoiding the various lengthy forms, such as "upon trust that they the said [*trustee*], or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, do and shall sell, &c.," and other similar forms. These, though proper in the case of powers, are unnecessary in the framing of trusts which devolve with the estate; see the opinion of Mr. Hayes, cited in Dart, V. & P. 627, n.; *Lane* v. *Debenham*, 11 Ha. 188; *Hall* v. *May*, 3 K. & J. 585.

Trusts for sale.

Form of expression.

(*e*) Any land, or any estate or interest in land, which under a will is subject to a trust or direction for sale, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, for the benefit of any person or persons for life, or any other limited period, and whether absolutely or subject to a trust for accumulation of income for payment of debts or other purpose, is deemed to be settled land within the meaning of the Settled Land Acts, and the person for the time being beneficially entitled to the income of the land until sale is deemed the tenant for life thereof; and the provisions of those Acts as to settled land apply to such land; but, the powers of those Acts are not to be exercised without the leave of the Court. The powers of sale given in the will to the trustees for sale may be exercised by them as long as no order has been made by the Court giving leave to exercise the powers conferred by the Settled Land Act. The order of the Court requires registration as a *lis pendens*, otherwise any person dealing with the trustees of the settlement will not be affected by the order; 45 & 46 Vict. c. 38, s. 63; 47 & 48 Vict. c. 18, ss. 6 and 7.

**Notes to Prec. 7.**

(*f*) See note (*b*), Prec. IV.

(*g*) By the 26th section of Lord Cranworth's Act (23 & 24 Vict. c. 145), a maintenance clause was imported into all wills executed after the 28th August, 1860. As to that clause, see *Re Breed's Will*, 1 Ch. D. 226; 45 L. J. Ch. 191; *Re Cotton*, 1 Ch. D. 232; 45 L. J. Ch. 201; 33 L. T. 720; *Re George*, 5 Ch. D. 837; 47 L. J. Ch. 118; 37 L. T. 204.

Maintenance of infants.

44 & 45 Vict. c. 41, s. 43.

That section was repealed by the Conveyancing Act, 1881, and is amended and superseded by sect. 43 of the latter Act, which, if a contrary intention is not expressed, applies to all wills, whenever executed; and authorises the application for maintenance of the income of a trust fund to which an infant is entitled only in contingency. But this section does not authorise the allowance of maintenance where, apart from the Act, the infant, on attaining twenty-one, would only be entitled to the legacy without interest. For instance, a simple legacy to an infant contingent on attaining twenty-one is not "property held in trust for an infant contingently on his attaining twenty-one:" such a legacy does not carry interest, the residuary legatee takes the whole residue and the whole income thereof unless and until the infant attains twenty-one. *Re Inman*, '93, 3 Ch. 518; 62 L. J. Ch. 940; 69 L. T. 374, and there is nothing to which the section can apply. If, however, the legacy, notwithstanding the contingency, is given with interest in the meantime, the section will apply, and it will be necessary for the executors to set apart the legacy and invest it; any income not applied for maintenance must be accumulated, and the accumulations to the time of the legatee's death will, if the legatee should die in infancy, belong to the infant, *In re Buckley's Trusts*, 22 Ch. D. 583; 52 L. J. Ch. 439; 48 L. T. 109; *In re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. Ch. 496; 50 L. T. 200; *In re Dickson*, 29 Ch. D. 331; 54 L. J. Ch. 510; 52 L. T. 707; *In re Wells*, 43 Ch. D. 281; 59 L. J. Ch. 113; 61 L. T. 806; *In re Bowlby*, '04, 2 Ch. 685; 73 L. J. Ch. 810; 91 L. T. 573. See *Re Holford*, '94, 3 Ch. 30; 63 L. J. Ch. 637; 70 L. T. 777; *Russell* v. *Russell*, '03, 1 Ir. R. 168. And see *post*, p. 259.

Where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent, *In re Gossling*, '03, 1 Ch. 448; 72 L. J. Ch. 433; 88 L. T. 279.

As to the accumulations if the infant attains twenty-one, see *Re Humphreys*, '93, 3 Ch. 1; 62 L. J. Ch. 498; 68 L. T. 729.

As to reading sect. 43 as incorporated with the will, see *Re Moody*, '95, 1 Ch. 101; 64 L. J. Ch. 174; 72 L. T. 190.

Where there is a bequest of personalty upon trust to divide it equally between such of the children of A. as shall survive the testator and attain twenty-one, the first child who attains twenty-one is not entitled, in addition to his share of the *corpus* and the income of such share, to the whole of the income of the fund until another child attains twenty-one (as was decided by North, J., in *Re Jeffery*, '91, 1 Ch. 671; 60 L. J.

Notes to Prec. 7.

Ch. 470; 64 L. T. 622), but the income will be divisible into as many parts as there are children in existence, and the first of such children who attains twenty-one will be entitled to his share of such income only, the remaining shares of income being applicable to the maintenance of the infant children, *Re Holford*, *ubi sup.*, and this is so whether the class is or is not capable of increase, *Re Jeffery*, '95, 2 Ch. 577; 64 L. J. Ch. 830; 73 L. T. 332.

Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance and education, *In re Alford*, 32 Ch. D. 383; 55 L. J. Ch. 659; 54 L. T. 674. As to what will constitute special circumstances, see *Havelock* v. *Havelock*, 17 Ch. D. 807; 50 L. J. Ch. 778; 44 L. T. 168, in which case, however, the devisee entitled to the accumulations in the event of the infants dying under age consented to the order for maintenance. This circumstance is not referred to in the head-note to the report in 17 Ch. D. 807, and has been frequently overlooked. It is submitted by the present editor that *Havelock* v. *Havelock* cannot be regarded as a reliable authority.

Where there was a direction in the will to set apart the legacy, the Court of Appeal held that this amounted to a gift of the intermediate income, *In re Medlock*, 55 L. J. Ch. 738; 54 L. T. 828. See *Re Clements*, '94, 1 Ch. 665; 63 L. J. Ch. 326; 70 L. T. 682; *Re Woodin*, '95, 2 Ch. 309; 64 L. J. Ch. 501; 72 L. T. 740.

In *Brophy* v. *Bellamy*, L. R. 8 Ch. 798; 43 L. J. Ch. 183; 29 L. T. 380, where trustees of a will were authorised to apply income of presumptive shares towards the maintenance of infants, notwithstanding the father's ability, the Court, in a suit for administration of the estate, would not control the discretion of the trustees, and at the request of the trustees made an order for payment of the income of a fund in Court to the father, on his undertaking to apply it for the benefit of the infants. In *In re Bryant*, '94, 1 Ch. 324; 63 L. J. Ch. 197; 70 L. T. 301, trustees who had a discretionary power to allow maintenance declined to exercise the power, the mother of the infants having an ample income and maintaining them sufficiently, and the Court refused to interfere with the trustees in the exercise of their discretion. In *Re Howarth*, L. R. 8 Ch. 415; 42 L. J. Ch. 316; 28 L. T. 54, it was held that on an application by an infant for maintenance, the Court has jurisdiction, without suit, to charge expenses of past maintenance and the costs of the application on the *corpus* of freeholds to which the infant was entitled in fee simple. But see *Cadman* v. *Cadman*, 33 Ch. D. 397; 55 L. J. Ch. 833; 55 L. T. 569, where *Re Howarth* was doubted.

(*h*) See note (*g*), Prec. XII.

## No. VIII.

WILL *of* MARRIED MAN *leaving all his Property after certain legacies to Trustees for Conversion, to pay Debts and Legacies and to invest the Surplus; Income to Wife during Widowhood; Capital among Children equally at Twenty-one or Marriage.—Settlement of Shares of Daughters.—Substitution of Grandchildren for Children dying before Testator.—On Failure of previous Trusts, as Wife shall appoint; in Default for Testator's Next of Kin.—Powers to sell Minerals apart from the Surface, to postpone Conversion, and in meantime to manage and lease.—Powers to vary Investments, Advancement, &c.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I REVOKE all prior wills and

Appointment of executors.

appoint —— and —— to be the executors and trustees hereof I BEQUEATH to my wife [*name*] absolutely all the household furniture plate linen china glass books pictures prints musical instruments wines provisions and other household effects (*a*) and also all my carriages and horses belonging to me at the time of my death and a legacy of £—— to be paid to her out of the first moneys coming to the hands of my executors I BEQUEATH the following legacies that is to say To each of my executors £—— as an acknowledgment for the trouble of executing my will (*b*) To &c. (*c*) AND as to all the rest of my estate and effects both real and personal (*d*)

Real and residue of personal estate to trustees;

—sale and conversion;

trusts of proceeds;

I DEVISE AND BEQUEATH the same unto my said trustees UPON TRUST to sell and convert into money my said real and residuary personal estates or such parts thereof as shall be of a saleable or convertible nature and to get in the other parts thereof AND I direct my trustees to hold the moneys to arise from such sale conversion and getting in and any ready money I may die possessed of UPON TRUST thereout

Prec. 8.

in the first place to pay the expenses incidental to the execution of the preceding trust and my debts and funeral and testamentary expenses AND in the next place to pay the pecuniary legacies hereinbefore bequeathed and to invest the surplus of the said moneys AND upon further trust to pay the income of the said moneys and investments to my wife [*name*] during her life if she shall so long continue my widow AND from and after her death or future marriage as to as well the capital as the income of the said moneys and investments UPON TRUST for such of my children as being sons shall attain the age of twenty-one years or being daughters shall attain that age or be married under that age such children if more than one to take in equal shares BUT I DECLARE that the share of each daughter (*e*) shall be retained by my trustees and held by them UPON TRUST to pay the income thereof to my daughter entitled thereto for her separate use during her life without power of alienation or anticipation AND from and after the death of my same daughter as to as well the capital as the income thereof UPON TRUST for all or any one or more of the issue of my same daughter in such proportions and for such interests to be absolutely vested within twenty-one years from her death as she whether covert or discovert shall from time to time by deed with or without power of revocation and new appointment or by her will appoint BUT no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot AND in default of appointment or subject to any partial appointment IN TRUST for the children of my same daughter who shall being sons attain the age of twenty-one years or being daughters attain that age or be married under that age such children if more than one to take in equal shares AND if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then IN TRUST for such persons for such interests and generally in such manner in all respects as my same daughter shall by will appoint AND

income to wife, during widowhood;

capital to children.

Settlement of the shares of daughters;

—issue of daughter as she shall appoint;

hotchpot;

—in default for children equally;

— if no child,

—as daughter shall by will appoint;

**Prec. 8.**

—daughter's next of kin.

in default of appointment or subject to any partial appointment IN TRUST for the persons who at the death of my same daughter shall be of kin to her and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she were dead a spinster and intestate such persons to take in the proportions prescribed by the same statutes AND I EMPOWER my same daughter (notwithstanding the trusts herein contained subsequently to the trust in her own favour) by deed executed either after or in contemplation of her marriage or by will to appoint the annual income to accrue due after her death of the said settled fund or any part of such income to and for the life of any husband of my same daughter who shall survive her. I DECLARE that if any son or daughter of mine shall die in my lifetime or if any son of mine shall survive me but die under the age of twenty-one years leaving issue who shall survive me and being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which their his or her parent would have taken in my residuary estate if such parent had survived me and lived to attain a vested interest therein AND in case no child or other issue of mine shall acquire an absolutely vested interest by virtue of my will then I direct my trustees to hold the said moneys and investments IN TRUST for such persons for such interests and generally in such manner as my wife she continuing my widow at her death shall by her will appoint AND in default of such appointment or subject to any partial appointment IN TRUST for the persons who at the death or future marriage of my wife shall be of kin to me and who under the statutes for the distribution of the personal effects of intestates would be entitled to my personal estate if I were to die intestate immediately after the death or marriage of my widow such persons to take in the proportions prescribed by the same statutes [I EMPOWER my trustees on the sale of any of my real estates under which there are or are supposed to be minerals (*f*) or to sell all or any of the minerals together with or apart from the surface and to grant or reserve such rights of way air and water of

Daughter empowered to appoint a life interest to a husband.

Substitution of grandchildren for children of testator predeceasing him.

On failure of previous trusts;

—as testator's widow shall by will appoint;

—for testator's next of kin.

Power to sell minerals apart from surface.

Prec. 8.

instroke and outstroke and other easements in upon over or under any of the said estates as may be necessary or desirable for the most effectual and advantageous winning working storing manufacturing selling and carrying away of any such minerals or any minerals under adjacent or neighbouring lands] I EMPOWER my trustees to postpone for such period as they shall judge expedient the sale conversion or getting in of my real and personal estates or any part thereof respectively [and during such period to manage and order all the affairs thereof as regards letting occupation cultivation repairs insurance against fire receipts of rents indulgences and allowances to tenants and all other matters and in the execution of this power of letting to grant building repairing improving mining or other leases for such terms at such rents and generally on such conditions as my trustees shall deem advantageous either taking or not taking fines or premiums which if taken shall be considered as capital] AND I DECLARE that for the purposes of enjoyment and transmission under the trusts herein contained my real estate shall be considered as money from the time of my death AND that the rents dividends interest and other yearly produce of my real and personal estates respectively to accrue due after my death and until the actual sale conversion and getting in thereof shall as well during the first year after my death as in subsequent years be deemed the income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the wasting or hazardous nature of the investments yielding the same AND that as between the capital and income of my estate no apportionment of rents dividends or other periodical payments shall take place for or in respect of the period current at my death (*g*) I DECLARE that so long as any person not under any disability shall for the time being be entitled to receive the income of the trust fund as tenant for life the power to vary investments conferred by statute shall not be exercised without the previous consent in writing of such person I EMPOWER my trustees with the consent of the respective prior life owners if any and if none at the discretion of my trustees to advance and apply any part not exceeding one-half of the

—to postpone conversion;

—interim management;

—leasing power;

— constructive conversion from testator's death;

—rents, &c., to be deemed income.

Restriction upon power to vary investments.

Advancement.

**Prec. 8.** capital to which under any of the dispositions hereinbefore contained each or any infant shall be entitled or presumptively entitled in or towards his or her advancement or preferment in the world I DECLARE that the expression "my trustees" used by me in this my will shall be construed as comprising and referring to the trustees or trustee for the time being of my will and that the power of appointing new trustees of my will shall be exerciseable by my wife during her widowhood, and after her death or marriage again by the persons and in manner by law prescribed, and that the number of trustees of my will may from time to time be varied but so that the number be not greater than four nor (except as a matter of temporary necessity) less than two (*i*)

New trustees.

AND LASTLY I appoint my wife during her widowhood and after her death or marriage again the said —— and —— to be the guardian or guardians of my children during minority (*k*) IN WITNESS, &c. (*l*).

Appointment of guardians.

**Notes to Precedent VIII.**

(*a*) See note (*c*), Prec. V.; and note (*b*), Prec. XV.

(*b*) See note (*l*), Prec. XI.

(*c*) As to legacies to charities, see note (*b*), Prec. XXIV.

(*d*) If the testator is possessed of copyhold property, refer to note (*h*), Prec. V.

(*e*) In *Re Dowling's Trusts*, L. R. 14 Eq. 463, the gift was in trust for all the testator's children who being sons should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest leaving issue, their shares to go to their children, with a proviso that on the marriage of any daughter a moiety of her share should be settled; it was held that the proviso applied only to marriage under twenty-one, and that a daughter who had attained twenty-one and not married was absolutely entitled to the whole of her share.

(*f*) By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, as altered by the Trustee Act, 1894 (57 Vict. c. 10, s. 3), it is enacted, in reproduction of and in substitution for sect. 2 of the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), which is repealed, as follows:—

Power to sanction sale of land or minerals separately.

Sect. 44.—"(1.) Where a trustee or other person is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of the minerals, or so disposing of the minerals, with or

without the said rights or powers, separately from the residue of the land.

(2.) Any such trustee, or other person with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise."

Sect. 17 of the Settled Land Act, 1882, effects the same object as sect. 44 of the Trustee Act, but does away with the necessity of obtaining the previous sanction of the Court. Unless it is thought desirable to set out the trustees' powers, the words in brackets may be left out, and the provisions of the Trustee and Settled Land Acts be relied upon.

Apportionment Act, 1870.

(*g*) It is enacted by 33 & 34 Vict. c. 35, that from the 1st August, 1870, "all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." The Act does not apply to policies of assurance (sect. 6), and its provisions do not extend to any case in which it is expressly stipulated that no apportionment shall take place (sect. 7).

See, as to this Act, *Clive* v. *Clive*, L. R. 7 Ch. 433; 41 L. J. Ch. 386; 26 L. T. 409; and as to its affecting the construction of a will of earlier date, *Jones* v. *Ogle*, L. R. 8 Ch. 192; 42 L. J. Ch. 334; 28 L. T. 245. In *Whitehead* v. *Whitehead*, L. R. 16 Eq. 528; 29 L. T. 289, it was held that dividends on shares specifically bequeathed were not apportionable as between the specific legatee and the testator's estate: but see *Pollock* v. *Pollock*, L. R. 18 Eq. 329; 44 L. J. Ch. 168; 30 L. T. 779. The rents of real estate devised are apportionable between the executor of the testator and the devisee, *Capron* v. *Capron*, L. R. 17 Eq. 288; 43 L. J. Ch. 677; 29 L. T. 826, whether the devise is residuary or specific, *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; 44 L. J. Ch. 143. And the Act applies to all instruments whether coming into operation before or after the passing of the Act, *Re Cline's Estate*, L. R. 18 Eq. 213; 30 L. T. 249; *Hasluck* v. *Pedley*, *ubi sup.*; *Constable* v. *Constable*, 11 Ch. D. 681; 48 L. J. Ch. 621; 40 L. T. 516. A share of profits of a newspaper was not within the Act, *Re Cox's Trusts*, 9 Ch. D. 159; 47 L. J. Ch. 735; but a bonus to the shareholders of a public company was apportioned, *In re Griffith*, 12 Ch. D. 655; 41 L. T. 540. In *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 48 L. J. Ex. 344; 40 L. T. 558, the Act was applied in a case between lessor and the trustee of a liquidating lessee; but see the reporter's query. Parish rates are not within the Act, *Re Wearmouth Crown Glass Co.*, 19 Ch. D. 640; 45 L. T. 757.

(*i*) See note (*b*), Prec. VI.

(*k*) See note (*g*), Prec. XII.

**Notes to Prec. 8.**

(*l*) The dispositions of the testator's property effected by this and the preceding form are substantially the same; but in Prec. VII. the trustees' powers of management, investment, &c., are intermingled with the beneficial trusts, thereby interfering, to some extent, with the continuity, and presenting an easy grasp of the general effect of the will: whereas in Prec. VIII. the trusts are first declared, in the simplest form, unencumbered by any details of management, and the ancillary powers are relegated to the latter part of the will. It is submitted that this is the preferable course, and that clauses and provisions which are nothing more than machinery for carrying out the will should not be interspersed amongst the disponing clauses. The trustees' powers are only means to an end, which is shown by the trusts declared, and the means should not obscure the end. It is a great advantage when the general effect of a will can be readily understood by layman and lawyer alike, and it is conceived that this advantage is likely to be best attained if the principal trusts, defining the extent of the interests of the beneficiaries, are kept distinct from the secondary powers, defining the authority of the trustees and indicating their *modus operandi*.

## No. IX.

WILL *of a* MARRIED WOMAN, *having no Issue, disposing of Real Estate and a Money Fund, over both of which she has Powers of appointment, and of her separate Property, in favour of her Husband and collateral Relations.—Appointment of the Real Estate to the Husband for Life; to Trustees, for the separate Use of a Married Sister for Life; to the Sister's Husband for Life; to her Issue, as she shall appoint; to her Children in fee, with Cross Limitations; to such Persons as she shall appoint; to the Survivor of the Sister and her Husband in Fee.—Appointment of the Money Fund to Trustees to be disposed of as Part of the Residue.—Bequest of Specific Legacies.—Bequest of the Residue to Trustees, to pay Pecuniary Legacies and Annuities; Funds to be set apart to answer the Annuities; Ultimate Trust for Brothers and Sisters equally.—Power to appoint New Trustees.*

THIS IS THE LAST WILL AND TESTAMENT of me [*name*] the wife of [*husband's name description and addition*] to take effect in the event only of my not leaving any issue living at my death WHEREAS under the will of [*name*] dated the —— day of —— 18— and proved on the —— day of —— 18— [*or* WHEREAS by an Indenture of Settlement dated the —— day of —— 18— and made between —— of the first part —— of the second part —— of the third part] I have a general power by my will (*a*) to appoint the use of the fee simple of certain freehold hereditaments situate at —— in the county of —— Now in exercise of the said power and of every other power now or at the time of my decease hereunto enabling me I APPOINT the said hereditaments to the uses following (namely) To THE USE of my husband for his life without impeachment of waste With remainder To THE USE of [*trustees*] their executors and administrators during the life

RECITAL of power of appointing real estate.

APPOINTMENT of such real estate;

—to testatrix's husband for life;

**Prec. 9.**

—to trustees, for the separate use of a married sister for life;

—to the sister's husband for life;

—to the sister's children and issue, as she shall appoint;

—to the sister's children equally in fee, with cross executory limitations;

—to such uses as the sister shall by will appoint;

—to the survivor of the sister and her husband in fee.

RECITAL of power of appointing settled funds;

—that testatrix is possessed of separate property.

APPOINTMENT of settled funds to executors, to be disposed of as separate property.

of my sister [*name*] the wife of [*name, &c.*] without impeachment of waste (*b*) UPON TRUST to pay the rents and profits as the same shall accrue due and not by way of anticipation to my said sister With remainder To THE USE of the said [*husband of testatrix's sister*] for his life without impeachment of waste With remainder To SUCH USES for the benefit of all or any one or more of the children and other issue of my said sister by her present or any future husband [*or* of my said sister by the said (*husband*)] such other issue being born in her lifetime as she shall by deed or will appoint And in default of appointment To THE USE of the children if more than one equally or the child if only one wholly of my said sister [*or* of my said sister by the said (*husband*)] in fee simple with cross limitations of the shares original and accruing of each of them on his or her dying under the age of twenty-one years without leaving issue To THE USE of the others equally or the other wholly in fee simple And as to the entirety in the event of there not being any child of my said sister or not any such child who shall attain the said age or die under that age and leave issue To SUCH USES as my said sister shall by her will appoint And in default of appointment To THE USE of the survivor of them my said sister and her said husband [*name*] in fee simple AND WHEREAS under the settlement made in contemplation of my marriage with my husband by indenture dated the —— day of —— 18— I have (subject to the trusts therein contained in favour of myself and my husband successively for life and in favour of the children of our marriage of which there has not been any issue) a general power of appointing by my will certain moneys stocks funds and securities thereby settled AND WHEREAS I am possessed as my separate property of certain personal estate Now in exercise of the said power given to me by the said settlement and of every other power now or at the time of my death hereunto enabling me I DIRECT the said money stocks funds and securities to be paid or transferred on the determination of the trusts prior to my said power of appointment to the said [*trustees*] and to be disposed of by them as part of the residue hereinafter bequeathed of my separate personal estate I DISPOSE of my separate personal

**Prec. 9.**

estate in manner following (namely) I BEQUEATH to my husband the use during his life of the plate on which my family crest is engraven he signing an inventory thereof to be kept by my said trustees I BEQUEATH to my said sister my said plate (subject to my said husband's right to use the same for his life) also my watch with the chain and seals and my jewels trinkets and other ornaments of my person I BEQUEATH to my servant [*name*] if she shall continue in my service till my death all my wearing apparel AND I DIRECT the same legacies to be delivered within one calendar month after my death I BEQUEATH to the said [*trustees*] the residue of my separate personal estate UPON TRUST thereout to pay the pecuniary legacies and annuities following (namely) A legacy of £ —— to my husband A legacy of £ —— to and for the separate use of my said sister such legacies to be paid within three calendar months (*c*) after my death A legacy of £ —— to every son who shall attain the age of twenty-one years and every daughter who shall attain that age or be married of my said sister to be paid immediately after the same shall become vested An annuity of £ —— to my servant [*name*] if she shall continue in my service till my death to be payable during her life (*d*) Also an annuity of £ —— to [*name, &c.*] and [*christian name*] his wife and the survivor of them for their lives and the life of such survivor which several annuities shall commence from my death and be paid quarterly without deduction (*e*) AND I DIRECT my said trustees to set apart within twelve calendar months after my death in their names in any of the Parliamentary Stocks or Public Funds or Government Securities of the United Kingdom (and not in any other investment) funds sufficient at the period of appropriation for answering the said annuities and in the meantime to pay the same annuities out of the said residue AND as to the said RESIDUE subject to the trust and direction aforesaid (but inclusive of the funds to be set apart pursuant to such direction when and as the respective annuities payable thereout shall drop) UPON TRUST to pay or transfer the same to and equally among my brothers and sisters [*names*] [the shares of my sisters to be enjoyed and disposed of by them respectively as separate property (*f*)] I DECLARE that a new trustee or

Disposition of separate property.

—use of plate to husband for life;

—watch, &c., to sister;

—apparel to servant.

Delivery of legacies.

Residue of separate property to trustees;

—to pay pecuniary legacies;

—and life annuities.

Direction to set apart funds for answering annuities.

Ultimate trust for brothers and sisters;

sisters' shares for their separate use.

**Prec. 9.**

Power to brothers and sisters to appoint new trustees.

Clauses extended to trustees for the time being.

Appointment of executors.

new trustees of this my will may from time to time be appointed by deed by my said brothers and sisters [*names*] or the survivors or survivor of them and subject as aforesaid in the manner prescribed by law (*g*) I DECLARE that the number of my trustees may from time to time be increased or diminished but so that the number do not exceed —— or be less than —— and that the previous clauses so far as they concern my trustees hereinbefore named shall extend and apply to the trustees and trustee for the time being of my will (*h*) I APPOINT my said brothers [*names*] to be executors of my will AND I REVOKE all other wills IN WITNESS &c.

**NOTES to Precedent IX.**

(*a*) The Wills Act (sect. 10, *ante*, p. 29) having abrogated all peculiarities of execution and attestation in regard to appointments which are clearly expressed to be exercisable by will, it is useless, in framing such a power, to make any requisitions of this nature, or, in framing an appointment under it, to refer to them when they exist.

Waste.

Tenant for life.

Equitable waste.

Owner of defeasible fee.

(*b*) Where it is intended that the *cestui que trust* shall enjoy the proceeds to arise from the fall of timber, &c., the estate of the trustees should be made unimpeachable for waste. Tenant for life, impeachable for waste, cannot cut timber at all, except periodically on a timber estate where the growth and cutting of timber is the mode of cultivation of the estate; but the general law as to what is timber is varied by the special customs of different localities, *Honywood* v. *Honywood*, L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671. Tenant for life under a written instrument which expressly declares his estate to be without impeachment of waste, may cut timber in a husbandlike manner for his own benefit, may open mines, and commit other similar acts with impunity, *Waldo* v. *Waldo*, 12 Sim. 107; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 75; but he cannot pull down or deface the family mansion, or fell ornamental timber, or commit other injuries of a like nature, *Wellesley* v. *Wellesley*, 6 Sim. 497; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117. See also *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; 26 L. J. Ch. 721; *Morris* v. *Morris*, 3 De G. & J. 323; 28 L. J. Ch. 329; *Gent* v. *Harrison*, Joh. 517; 29 L. J. Ch. 68; 1 L. T. 128; *Gordon* v. *Woodford*, 6 Jur. N. S. 59; 29 L. J. Ch. 222; 1 L. T. 260. And an owner in fee, whose estate is defeasible by an executory devise over on his dying without leaving issue living at his death, is, as to equitable waste, in the same position as a tenant for life unimpeachable for waste, *Turner* v. *Wright*, 2 D. F. & J. 234; 29 L. J. Ch. 598; *Blake* v. *Peters*, 1 D. J. & S. 345; 32 L. J. Ch. 200; 9 L. T. 247. Where tenant for life impeachable for waste cut timber, but not otherwise than in due course of management, he was held entitled to the income of the proceeds, and

**Notes to Prec. 9.**

on his death the next tenant for life, who was dispunishable for waste, was held entitled to the capital, *Lowndes* v. *Norton*, 6 Ch. D. 139; 46 L. J. Ch. 613. And where tenant for life, unimpeachable for waste, cut ornamental timber, but under such circumstances that the Court would have directed it to be cut, he was held entitled to the proceeds, *Baker* v. *Sebright*, 13 Ch. D. 179; 49 L. J. Ch. 65; 41 L. T. 614. As to cutting ripe timber, where tenant for life is impeachable for waste, see sect. 35 of the Settled Land Act, 1882. See also, on the subject of waste in general, the notes to *Bowles' Case*, in Tud. L. C. R. P.; to *Garth* v. *Cotton*, in 1 Wh. & Tud. L. C. Eq., and the first chapter of Yool's Treatise on Waste, Nuisance, and Trespass. As to working new seams of an existing mine, see *Spencer* v. *Scurr*, 31 Be. 334: and as to abandoned or dormant mines, *Bagot* v. *Bagot*, 32 Be. 509. See also *Earl Cowley* v. *Wellesley*, 35 Be. 635; *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, 466; 48 L. J. Ch. 811; 41 L. T. 289.

When legacies are to be paid.

(c) By the ordinary rule, an executor is allowed, for the payment and satisfaction of pecuniary and specific legacies, twelve months from the testator's decease; this being considered a reasonable time for enabling him to ascertain the solvency of the estate, and get in the assets, *Benson* v. *Maude*, 6 Mad. 15; *Brooke* v. *Lewis*, *ib.* 358; 23 R. R. 246. An executor, however, may, if he chooses, discharge a legacy at an earlier period, since it is due at the testator's decease, and the postponement of a year is merely made for convenience, which may in some cases require less; for if the solvency of the estate is beyond all question, and the property is immediately available, there is no reason for deferring payment; and the adherence, under such circumstances, to the rule which allows a year, is an abuse of it. Of course, a direction to pay or deliver legacies at an earlier period operates only as between claimants under the wills and ought not, any more than the general rule which allows a year, to be acted upon by an executor until the ascertained circumstances of the estate justify the measure, in other words, until he is satisfied of its sufficiency to answer debts and legacies; if indeed, looking at the possible existence of latent demands, the sufficiency of the estate can ever be said to be completely ascertained.

Direction to pay at an earlier period.

Annuity for life, or perpetual.

(d) The general rule is that where an annuity is given to a person by a will creating the annuity, the annuitant takes for life only, *Yates* v. *Maddan*, 3 M'N. & G. 532; 87 R. R. 184, and the authorities there discussed. A bequest of an annuity simply implies no more than a gift for life, unless there is something else in the will to enlarge the bequest, *Potter* v. *Baker*, 13 Be. 273; 88 R. R. 484; *Blewitt* v. *Roberts*, Cr. & Ph. 274; 9 L. J. Ch. 342; *Nichols* v. *Hawkes*, 10 Ha. 342; 22 L. J. Ch. 255; 90 R. R. 384; *Lett* v. *Randall*, 2 D. F. & J. 388; 30 L. J. Ch. 110; 3 L. T. 455; but the question is entirely one of intention, to be deduced from the words of the whole will, *Banks* v. *Braithwaite*, 32 L. J. Ch. 198; 8 L. T. 80. An annuity is perpetual where the testator indicates an intention to that effect by segregating and appropriating a portion of his property, from the profits of which the annuity

**Notes to Prec. 9.**

is to be paid; or where the annuity is given out of, or the gift is coupled with or has reference to, a particular fund, the pointing to the fund being such an indication of intention as amounts to a dedication of so much of the fund as will absolutely purchase the annuity, *Stokes* v. *Heron*, 12 C. & F. 161; 69 R. R. 83; or where the testator makes a distinct gift of the income of a given fund, *Bent* v. *Cullen*, L. R. 6 Ch. 235; 40 L. J. Ch. 250. And an annuity to A. directed "to be purchased in the British funds," accompanied with a direction to sell certain lands, "the produce to go to the carrying out of the aforesaid annuity," was held to be perpetual annuity, *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576; 22 L. J. Ch. 355; 95 R. R. 231; see, however, *Re Grove's Trusts*, 1 Gif. 74; 6 L. T. 376. A direction to buy an annuity in the public funds means to purchase such an amount in the funds as will suffice to produce the annuity; and where a fund is to be purchased for A., that fund so purchased belongs to A., *Ross* v. *Borer*, 2 J. & H. 469; 31 L. J. Ch. 709; 6 L. T. 514. And if a certain amount *per annum* is given, and on the construction of the whole will this is held to be a gift in perpetuity, but the testator has not specified out of what particular property or fund the annual sum is to be provided, the annuitant is entitled to the best security to be obtained, *Hill* v. *Ratley*, 2 J. & H. 634; but see *Vickery* v. *Evans*, 33 Be. 376; 33 L. J. Ch. 261; 9 L. T. 822. See also *Hedges* v. *Harpur*, 3 De G. & J. 129; 27 L. J. Ch. 742; *Mansergh* v. *Campbell*, 3 De G. & J. 232; *Hicks* v. *Ross*, L. R. 14 Eq. 141; 41 L. J. Ch. 677; 26 L. T. 470; Hawkins, Constr. Wills, 125. In *Wilkins* v. *Jodrell*, 13 Ch. D. 564; 49 L. J. Ch. 26; 41 L. T. 649, the testator bequeathed an annuity to A., and in the event of her death to be continued to her children for their maintenance and education; the annuity endured throughout the life of the last survivor of A.'s children. In *In re Morgan*, '93, 3 Ch. 222; 62 L. J. Ch. 789; 69 L. T. 407, annuities were bequeathed to several annuitants "or their descendants." It was held that the several annuitants took annuities for life only, with substitutionary gifts to the respective descendants, if any, living at the testator's death, of such of them as should not survive the testator. Also where a testator directed his trustees to pay a "further annuity" to his widow for the maintenance and education of his infant daughter till his daughter should attain the age of twenty-one, and the widow died during the minority of the daughter, it was held that the further annuity did not cease with the death of the widow, *In re Yates*, '01, 2 Ch. 438; 70 L. J. Ch. 725; 85 L. T. 398.

Income of fund inadequate.

Another point which has frequently occurred in gifts of annuities is, whether, in the event of the annual income of the estate or fund out of which the annuity is payable proving inadequate for the purpose, the *corpus* or capital is applicable to supply the deficiency.

Cases in which *corpus* is not appli-

The question is entirely one of intention, to be gathered from the words of the particular will. If the annuity is made payable out of the rents and profits of real estate devised to trustees, who are directed on

**Notes to Prec. 9.**

the death of the annuitant to convey the estate to others, *Foster* v. *Smith*, 1 Ph. 629; 65 R. R. 472; or out of the interest, dividends, and produce of a fund, followed by a trust to transfer the *corpus* on the death of the annuitant, expressed in words indicating an intention to leave the *corpus* undiminished, *Earle* v. *Bellingham*, 24 Be. 445; or if the testator in any way manifests an intention that the fund shall be preserved in its integrity during the life of the annuitant, and in that state go over, *Baker* v. *Baker*, 6 H. L. C. 616; 27 L. J. Ch. 417; *Michell* v. *Wilton*, L. R. 20 Eq. 269; then the *corpus* is not applicable to make good the deficiency. See also *Miller* v. *Huddlestone*, 3 M'N. & G. 513; 21 L. J. Ch. 1; 87 R. R. 171; *Hindle* v. *Taylor*, 20 Be. 109; 104 R. R. 208; *Addecott* v. *Addecott*, 29 Be. 460; *Sheppard* v. *Sheppard*, 32 Be. 194. But where real estate is devised subject to and chargeable with the payment of an annuity, *Picard* v. *Mitchell*, 14 Be. 103; *Byam* v. *Sutton*, 19 Be. 556; or a residue is given "from and after payment" of an annuity "and subject thereto," *Birch* v. *Sherratt*, L. R. 2 Ch. 644; 36 L. J. Ch. 925; 17 L. T. 153; *Mason* v. *Robinson*, 8 Ch. D. 411; 47 L. J. Ch. 660; or where chattels real are charged with an annuity, and there is no direction that the annuity is to be paid out of income only, *Pearson* v. *Helliwell*, L. R. 18 Eq. 411; 31 L. T. 159; or if the testator directs the setting apart or the investment of so much money as will produce a certain annual sum, *May* v. *Bennett*, 1 Rus. 370; 25 R. R. 72; *Wright* v. *Callender*, 2 D. M. & G. 652; 21 L. J. Ch. 787; 95 R. R. 270; *Mills* v. *Drewitt*, 20 Be. 632; *Miner* v. *Baldwin*, 1 S. & G. 522; 96 R. R. 467; *Bright* v. *Larcher*, 3 De G. & J. 148; 28 L. J. Ch. 837; *Carmichael* v. *Gee*, 5 App. Cas. 588; 49 L. J. Ch. 829; 43 L. T. 227; or if the testator directs that not only the interest of a fund, but the fund itself, is to be held in trust to pay an annuity, *Hickman* v. *Upsall*, 2 Gif. 124; or if there be a gift of rents and profits or income, without restriction as to time, for the purpose of meeting the annuity, followed by a gift over of the residue, *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; 32 L. J. Ch. 1; but compare *Stelfox* v. *Sugden*, Joh. 234; then the *corpus* is applicable to make good the deficiency. In *Booth* v. *Coulton*, L. R. 5 Ch. 684; 39 L. J. Ch. 622; and *Taylor* v. *Taylor*, L. R. 17 Eq. 324, annuities were held to be a continuing charge on rents and profits, but not a charge on the *corpus* of the estate, which in the latter case was devised in strict settlement. The principal of the cases quoted in this paragraph are reviewed and distinguished in *In re Boden*, '07, 1 Ch. 132; 76 L. J. Ch. 100; 95 L. T. 741; *In re Bigge*, '07, 1 Ch. 714; 76 L. J. Ch. 413; 96 L. T. 903; *In re Howarth*, '09, 1 Ch. 485; 78 L. J. Ch. 305; 100 L. T. 263.

cable to make good the deficiency.

Cases in which *corpus* is applicable.

When an annuity charged upon the *corpus* of settled real estate is in arrear, the Court has power to order the arrears to be raised by sale or mortgage of the estate, but the making of such an order is a matter, not of course, but of discretion, *Re Tucker*, '93, 2 Ch. 323; 62 L. J. Ch. 442; 69 L. T. 85.

As to marshalling funds or estates for the payment of annuities, see Marshalling.

**Notes to Prec. 9.**

*Fielding* v. *Preston*, 1 De G. & J. 438; *Yates* v. *Yates*, 28 Be. 637; 29 L. J. Ch. 872.

Where an annuity was left to A., to be paid by the testator's executor and residuary legatee B., who was empowered to require A. to attend personally at a particular place to give receipts, it was doubted whether such a condition was good; but whether good or not, it was held that the annuity was assignable, *Arden* v. *Goodacre*, 11 C. B. 883; 21 L. J. C. P. 129; 87 R. R. 799.

Registration.

Annuities given by will are not required to be registered. See 18 & 19 Vict. c. 15, s. 14. And as to that Act, see *Greaves* v. *Tofield*, 14 Ch. D. 563; 43 L. T. 100.

Annuities should, in general, be given free from legacy duty, 7 Byth. Jarm. 824.

Gift of an annuity "free from taxes;" annuitant pays the income-tax.

A gift by will of an annuity "clear of all taxes and deductions," or of a rentcharge "clear of legacy duty and every other deduction whatsoever," will not exempt the person entitled to the annuity or charge from payment of the property or income tax. See 5 & 6 Vict. c. 35, ss. 73, 102, 103; 16 & 17 Vict. c. 34. The thing that is given is the thing that is to pay the tax, *Wall* v. *Wall*, 15 Sim. 513; 16 L. J. Ch. 305; 74 R. R. 137; and the income tax is not properly a deduction out of the estate or legacy, but a charge which the legislature has fixed on the person himself who receives the benefit, *Lethbridge* v. *Thurlow*, 15 Be. 335; 21 L. J. Ch. 538; 92 R. R. 448. See also *Sadler* v. *Rickards*, 4 K. & J. 302; *Abadam* v. *Abadam*, 33 Be. 475; *Peareth* v. *Marriott*, 22 Ch. D. 182; 48 L. T. 170. But a testator may so explain the word "deduction" as to show that he intends it to include income tax, and then effect will be given to his intention, *Turner* v. *Mullineux*, 1 J. & H. 335; *In re Buckle*, '94, 1 Ch. 286; 63 L. J. Ch. 330; 70 L. T. 115. Where a testator devised a mansion and lands to his wife for life, and directed his trustees, out of the rents of other real estates, during the wife's life to insure and repair and pay all taxes, parliamentary, parochial, or otherwise, affecting the hereditaments given to his wife, it was held that income tax came within the words "affecting the hereditaments," that the direction did not contravene the terms of the Income Tax Acts, and that the trustees were bound to pay the income or property tax payable in respect of the widow's interest, *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 62. And where lands were devised to trustees to the use that M. should receive during her life one yearly rentcharge of 2,200*l.*, to be charged upon and issuing out of the lands mentioned, to be paid half-yearly "without any deduction or abatement whatsoever, on account of any taxes, charges, or assessments already or to be thereafter taxed, charged, assessed, or imposed on the same hereditaments, or on the said rentcharge of 2,200*l.*, or on the said M. or her assignees in respect thereof, by authority of parliament, or otherwise howsoever," it was held that M. was entitled to receive the rentcharge in full, without any deduction in respect of income tax, *Festing* v. *Taylor*, 3 B. & S. 235; 32 L. J. Q. B. 41; 7 L. T. 429. See also

*Bannerman* v. *Young*, 21 Ch. D. 105; 51 L. J. Ch. 449. These, however, were cases of mere bounty; but a contract for the payment of an annuity or rentcharge in full, without deducting the tax, is void, so far as the latter proviso is concerned; and, consequently, notwithstanding that there is an express trust for payment of the annuity or rentcharge in full, the income tax must be borne by the annuitant or donee of the charge, *Floyer* v. *Bankes*, 32 L. J. Ch. 610; 8 L. T. 483.

Time of commencement, and first payment of annuity.

(*e*) Where the time of first payment is fixed by the will, the payment must of course be made as directed, if the executor is satisfied of the sufficiency of the estate to answer debts and legacies; but if no time of payment is fixed, an annuity commences from the day of the testator's death, and the first payment is to be made at the end of twelve months from that day, 2 Wms. Exors. 1116; *Houghton* v. *Franklin*, 1 S. & S. 392; 24 R. R. 201. But it seems doubtful whether this rule would hold in a case where the annuity is given out of a residue, *Storer* v. *Prestage*, 3 Mad. 168. And as to the distinction in this respect between an annuity and a legacy for life, see *Gibson* v. *Bott*, 7 Ves. 96; 6 R. R. 90.

To say that the first quarterly or half-yearly payment of an annuity shall be made at a given period does not necessarily imply that the annuity is to commence from the commencement of the quarter or half-year terminating at such day of payment. For instance, where a testator gave an annuity to A. for life, and directed the first payment to be made within one month from his (the testator's) death, the annuity was held to commence from the death of the testator; and though the first year's payment was to be made at the appointed time, the second annual payment did not become due until the end of the second year, *Irvin* v. *Ironmonger*, 2 R. & M. 531. It will be observed that, in this case, to have held the annuity to be payable continuously from the first payment, would have had the effect of giving it a commencement in the lifetime of the testator. See also *Williams* v. *Wilson*, 5 N. R. 267, as to apportionment of the first payment of an annuity directed to be paid on the usual quarter days, and note (*g*), Prec. VIII.

(*f*) The Married Women's Property Act, 1882, would, of course, render the sisters' shares their separate property if these words were omitted. The insertion of these words may, however, under certain circumstances, have important consequences to the legatees.

Where a marriage settlement contains a provision for settlement of after-acquired property of the wife, excepting property which may be bequeathed to her for her separate use (which is a form of covenant for settlement of after-acquired property in very common use), property bequeathed to her, but not expressed to be for her separate use, will be bound by the covenant, whilst property bequeathed to her, and expressed to be for her separate use, will be exempt from such covenant. This curious result is brought about by sect. 19 of the Married Women's Property Act, 1882, which excepts settlements from the operation of the Act. The consequence is that if the words within brackets are

**Notes to Prec. 9.**

omitted, the sisters' shares may possibly be bound by covenants contained in their marriage settlements to settle after-acquired property, which might not be the case if such words were inserted, *Re Whitaker*, 34 Ch. D. 227; 56 L. J. Ch. 251; 56 L. T. 34.

(*g*) See note (*b*), Prec. VI.

As to the expression "trustees or trustee for the time being," &c.

(*h*) Where this plan is adopted, the expression throughout the previous parts of the will should be simply "my said trustees;" where it is not adopted, the expression should be "the trustees or trustee for the time being of my will." Or, the words "my trustees or trustee" may be used throughout, and at or near the end of the will a clause may be introduced, declaring that the expression "my trustees or trustee" shall be construed and taken to mean the trustees or trustee for the time being, whether original or substituted. Much confusion and uncertainty not unfrequently arises from want of accuracy or uniformity in this particular. Sometimes in the same will, and with reference to the same subject, we find—"the said A. B. and C. D., and the survivor of them, his heirs, executors, administrators, and assigns," —"the said A. B. and C. D., and the survivor of them, his executors and administrators,"—"the said A. B. and C. D., their heirs, executors," &c.—"the said A. B. and C. D., and the survivor of them, their heirs, executors and administrators, and the trustees or trustee to be appointed," &c.

## No. X.

WILL *devising Real Estate to Trustees, Upon Trusts for raising Money by Mortgage in aid of the Personal Estate to pay Debts and Legacies; and, subject thereto, for the Testator's Son and his Issue in strict Settlement; and, failing such Issue, for raising certain sums; and, subject thereto, for collateral Relations.—Specific Bequest of Leaseholds for Years, and other Specific Legacies.—Bequest of Annuities and Pecuniary Legacies.—Power to appoint new Trustees.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*] I DEVISE all the freehold and copyhold manors messuages lands tenements and hereditaments to which I may be entitled at my death unto and to the use of [*trustees*] in fee simple upon the trusts following (namely) UPON TRUST in the first place with or out of the rents and profits of the said devised estates or by mortgaging (*a*) or charging the same or a competent part or parts thereof to raise in aid of my personal estate (if insufficient) so much money as shall be requisite to satisfy my debts (*b*) and funeral and testamentary expenses and the annuities and pecuniary legacies hereinafter bequeathed together with the expenses of executing this trust and to apply the money to be so raised accordingly And subject thereto IN TRUST for my son [*name*] during his life and as to the said freehold hereditaments without impeachment of waste (*c*) And immediately after his death IN TRUST for the sons of my said son successively according to seniority in tail [*or* in tail male] (*d*) And failing such issue IN TRUST for the daughters of my said son equally as tenants in common in tail with cross remainders between such daughters in tail as to both the original and the accruing shares And failing such issue UPON TRUST with or out of the rents and profits of the said devised estates or by mortgaging

Devise of freeholds and copyholds to trustees;

—upon trust to raise money by mortgage, in aid of the personal estate, to pay debts, &c.;

—and subject thereto, in trust for testator's son and his issue, in strict settlement;

and, failing such issue,

—upon trust to raise and pay certain

**Prec. 10.**

sums; and, subject thereto,

or charging the same or a competent part or parts thereof to raise and pay to the respective persons or classes of persons next hereinafter named or described if living at the time of the failure of the antecedent trusts the several sums of money which immediately follow their respective names or descriptions (that is to say) [*name &c.*] £ —— [*name &c.*] £—— &c. The children of my sister [*name*] who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be married £ —— apiece The children of &c. £ —— apiece And subject thereto as to one undivided moiety of my said devised estates IN TRUST for my brother [*name*] in fee simple. And as to the other undivided moiety thereof IN TRUST for my nephews (*e*) [*names*] equally as tenants in common in fee simple I BEQUEATH the messuage in which I now reside situate at —— and held by me under a lease dated &c. to my wife [*name*] for her life if my term therein shall so long endure and after her death to my said son [*name*] for the then residue of such term I BEQUEATH the several specific legacies following (namely) To my wife all the wines liquors fuel and other consumable household stores and provisions which shall belong to me at my death for her absolute use To A. and B. and the wife of B. equally £500 (*f*) To &c. I BEQUEATH to the several persons next hereinafter named for their respective lives the several annuities which follow their respective names (that is to say (To my wife £ —— a year in addition to the provision made for her by the settlement on our marriage To each of my sisters [*names*] £ —— a year (*g*) To &c. AND I DIRECT such annuities to be paid in equal portions on the four usual quarterly days of payment of rent and the first portion to be paid on such of the said days as shall occur next after my death but proportionate parts of the said annuities shall not be payable for the days elapsed at the deaths of the respective annuitants of the then current quarter (*h*) AND I DIRECT funds to be appropriated in the names or name of my trustees or trustee for the time being out of my personal estate (but not by mortgaging or charging my real estate (sufficient at the period of appropriation to answer by means of the income thereof the payment of the

—in trust for collateral relations.

Bequest of leasehold house to wife for life, and then to son absolutely.

Bequest of specific legacies.

Bequest of annuities;

with direction to set apart funds.

**Prec. 10.**

same annuities which funds on the dropping of the respective annuities shall follow the destination of the residue of my personal estate I BEQUEATH to the several persons next hereinafter named the several legacies which follow their respective names (that is to say) To my niece [*name*] in addition to the provision made for her by the settlement executed by me on her marriage the sum of £ —— To my niece [*name*] the sum of £ —— in satisfaction of a legacy bequeathed to her by the will of —— and received by me To my nephew [*name*] the sum of £ —— which legacy together with the sum of £ —— advanced by me for his benefit makes up the sum of £ —— which I originally promised to leave him AND I DIRECT the said pecuniary legacies to be paid at the end of —— calendar months next after my death. AND I DECLARE that such of the annuities and pecuniary legacies hereinbefore bequeathed as shall lapse or fail by the deaths of legatees in my lifetime or otherwise shall so far as the same may charge or affect my real estate lapse or fail for the benefit of my devisees and not of my heir (*i*) I BEQUEATH the residue of my personal estate unto my said son [*name*] for his absolute benefit I DECLARE that the power of appointing new trustees conferred by statute shall be exerciseable by my son [*name*] during his life (*k*) I APPOINT the said [*trustees*] to be executors of my will AND LASTLY I REVOKE all former wills declaring this writing alone to express the whole of my will.

Bequest of pecuniary legacies.

Destination of lapsed legacies.

Bequest of residue to son.

Power to appoint trustees.

Appointment of executors.

IN WITNESS &c.

**NOTES to Precedent X.**

(*a*) The object of providing a fund, in aid of the personal estate, may be attained by limiting a term of years only to the trustees; but while that plan has the advantage of giving legal estates to the ulterior takers, and consequently of superseding the necessity for a future conveyance by the trustees, it is not so well adapted to the present mode of framing mortgages, which are commonly made to embrace the fee simple.

Of limiting a term to raise money for payment of debts and legacies.

(*b*) By 3 & 4 Will. 4, c. 104, the freehold and copyhold estates of persons dying on or since the 29th August, 1833, who have not by will charged their real estates with the payment of debts, are constituted assets to be administered in the Courts of Equity for the payment of debts, due as well on simple contract as on specialty; and by 32 & 33 Vict.

Freehold and copyhold estates of deceased persons subjected to

**Notes to Prec. 10.**

their simple contract debts.

c. 46, it is enacted that in the administration of the estate of any person dying after 1869, all creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether legal or equitable, but without prejudice to any security.

By the Land Transfer Act, 1897, s. 2, sub-s. (3), "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies."

But, though a testamentary provision for the payment of debts is not now dictated by the same imperative considerations as formerly, yet such provision is still useful.

Order in which funds to be applied in payment of testator's debts.

The Wills Act makes no alteration in the law which made real estate assets for the payment of debts, *Eddels* v. *Johnson*, 1 Gif. 22; 27 L. J. Ch. 302. The order of application of the several assets in the payment of debts is given, Jarm. Wills, Ch. XLVI.

Provision should be made for payment of debts, before realty devised to infants.

A testator ought never to devise real estate to infants or unborn persons until he has made ample provision for the payment of his debts; and where such provision is made out of real estate, means should, notwithstanding the Act 22 & 23 Vict. c. 35, be also expressly provided for effecting a sale or mortgage, or both, under trusts or powers properly framed for the purpose. Formerly, this precaution was requisite only where there were creditors by specialty, or the testator's lands were by the will subjected to the payment of debts, but, under the existing law, it applies with equal force whether there be any such charge or not, as creditors by simple contract are entitled, in the absence of any express charge, to have the estate made available for their debts by means of a sale under the direction of the Court; though it is to be observed that creditors, whose claims are founded on the recent statute have no lien on the estate in the hands of an alienee of the heir or devisee, which creates an important difference between such creditors and those who claim under a general charge; though even in the latter case a purchaser for money or a mortgagee is exempt from seeing to the application of the money.

See further as to the liability of lands in fee simple to debts, the notes to *Taltarum's* and *Seymour's Cases*, in Tud. L. C. R. P.

Effect of a devise upon trust to pay debts;

It was formerly much doubted whether a devise of real estate in trust for the payment of debts had the effect of reviving a debt which at the time of the testator's decease would have been barred by the Statute of Limitations; but the negative was established by the case of *Burke* v. *Jones*, 2 V. & B. 275; 13 R. R. 83. However, it is clear that, if the six years allowed by the statute, in the case of a simple contract debt, have

**Notes to Prec. 10.**

not run out in the testator's lifetime, a devise in trust for payment of debts, or a mere charge of debts, will prevent the time from going on so as to constitute a bar, and in such case time will run from the death of the testator; for it is not expected that creditors should pursue their legal remedies after a trustee has been appointed to pay them, *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 107; *Hargreaves* v. *Michell*, 6 Mad. 326; 23 R. R. 231; *Hughes* v. *Wynne*, T. & R. 307; *Moore* v. *Petchell*, 22 Be. 172. But a bequest of personalty for the payment of debts does not prevent the operation of the statute, *Scott* v. *Jones*, 4 C. & F. 382; *Freake* v. *Cranefeldt*, 3 M. & C. 499; *Evans v. Tweedy*, 1 Be. 55; but see *Williamson* v. *Naylor*, 3 Y. & C. Ex. 208; 90 R. R. 893; *Moore* v. *Petchell*, 22 Be. 172.

—of a bequest of personalty.

(*c*) This clause as to waste is properly confined to the freeholds, because waste, voluntary or permissive, unauthorised by the custom, works a forfeiture of copyholds, Co. Litt. 60, a.

Copyholds, waste.

(*d*) Real estate of inheritance, including therein copyholds held of manors in which there is a custom to entail, can alone be the subject of a proper entail. When leaseholds for lives are limited to A. and the heirs of his body, he is said to take a *quasi* estate tail, which is barrable without an enrolled deed pursuant to 3 & 4 Will. 4, c. 74. But if there is a tenant for life and a tenant in tail in remainder of leasehold for lives, the consent of the tenant for life is necessary to enable the tenant in tail to bar the subsequent remainders, 1 Hayes, Conv. 197; *Allen* v. *Allen*, 2 Dr. & War. 337; *Edwards* v. *Champion*, 3 D. M. & G. 202; *Pickersgill* v. *Grey*, 30 Be. 352; 31 L. J. Ch. 394; 5 L. T. 706. If copyholds, held of manors in which there is no custom to entail, are limited to A. and the heirs of his body, A. will take an estate in those copyholds analogous to an estate in fee simple conditional at the common law, *Doe* v. *Clark*, 5 B. & Al. 458; 24 R. R. 457; *Doe* v. *Simpson*, 4 Bing. N. C. 333, 340. And if leaseholds for years, or other personal estate, is limited to A. and the heirs of his body, A. takes at once the absolute property, just as he would take it under a simple indefinite gift, *Leventhorpe* v. *Ashbie*, Roll. Ab. 831, pl. 1; and see the notes to that case in Tud. L. C. R. P.

What may be the subject of an entail.

Bar of *quasi* estates tail by unenrolled deed.

Copyholds.

Leaseholds for years.

(*e*) A gift in a will to a class of persons described by relationship will, in the absence of an overruling context, be construed as a gift to all persons answering the relationship, whether of the whole blood or of the half-blood. Therefore a bequest simply to the sister of A. will extend to A.'s sisters of the half-blood, *In re Reed*, 57 L. J. Ch. 790; and the description of nephews and nieces will include children of a half-blood brother or sister, *Grieves* v. *Rawley*, 10 Ha. 63; 22 L. J. Ch. 625; 90 R. R. 285. If a testator gives a legacy to the "children" of a deceased person, mentioning that person as dead, and at the date of the will there are no children of that person, but there are grandchildren, the gift takes effect in favour of the grandchildren, *Berry* v. *Berry*, 3 Gif. 134; *Fenn* v. *Death*, 23 Be. 73. But if the testator mentions the "children" of several persons, of whom some have left children, and

Gifts to relations:

half-blood,

"children,"

**Notes to Prec. 10.**

one has left grandchildren only, the word children having been only once used cannot have two meanings attributed to it, *Radcliffe v. Buckley*, 10 Ves. 195; 7 R. R. 383; with which compare, *In re Smith*, 35 Ch. D. 558; 56 L. J. Ch. 771; 56 L. T. 878. If the testator shows an intention to use the word "children" in its normal and ordinary meaning, by himself having mentioned grandchildren as well as children, the word children will receive its ordinary meaning. See Jarman, Wills, Ch. XXX., p. 1000.

"nieces,"

Similarly, a gift to "nieces" means nieces in the first degree, *Crook* v. *Whitley*, 7 D. M. & G. 490; 26 L. J. Ch. 350, and a gift to the "present nieces of A." is identical with "the nieces of A." (*ib.*); "nephews and nieces" will not include grandnephews and grandnieces if there are proper nephews and nieces to answer the description, *Thompson* v. *Robinson*, 27 Be. 486; 29 L. J. Ch. 280; 1 L. T. 121; *Williamson* v. *Moore*, 10 W. R. 536; *Re Blower's Trusts*, L. R. 6 Ch. 351; 42 L. J. Ch. 24; 25 L. T. 181; *In re Fish*, '94, 2 Ch. 83; 63 L. J. Ch. 437; 70 L. T. 825. Where a widow bequeathed to her nephews and nieces simply, it was held that this did not include the nephews and nieces of her husband, *Smith* v. *Lidiard*, 3 K. & J. 252; and though a testatrix gave a specific legacy to a niece of her husband as "my niece A. B.," and gave her residue to "all my nephews and nieces," the nephews and nieces by blood of the testatrix took the residue to the exclusion of A. B., *Wells* v. *Wells*, L. R. 18 Eq. 504; 43 L. J. Ch. 681; 31 L. T. 16; *Merrill* v. *Morton*, 17 Ch. D. 382; 50 L. J. Ch. 249; 43 L. T. 750; *In re Cozens*, '03, 1 Ch. 138; 72 L. J. Ch. 39; 87 L. T. 581 but if the testatrix had had no nephew or niece, the nephews and nieces of the husband would have taken, *Hogg* v. *Cook*, 32 Be. 641; *Sherratt* v. *Mountford*, L. R. 8 Ch. 928; 42 L. J. Ch. 688; 29 L. T. 284; *In re Fish*, '94, 2 Ch. 83; 63 L. J. Ch. 437; 70 L. T. 825, and where a married man bequeathed to his nephews and nieces "on both sides," the gift was held to extend to the nephews and nieces of his wife, *Frogley* v. *Phillips*, 3 D. F. & J. 466; 3 L. T. 718.

"nephews and nieces,"

"cousins,"

The word "cousins" used *simpliciter* is held to mean first cousins, *Caldecott* v. *Harrison*, 9 Sim. 457; 47 R. R. 285; *Stoddart* v. *Nelson*, 6 D. M. & G. 68; 25 L. J. Ch. 116; 106 R. R. 29; *Stevenson* v. *Abington*, 31 Be. 305; 6 L. T. 345; *Burbey* v. *Burbey*, 9 Jur. N. S. 96; 6 L. T. 573. In *In re Taylor*, 34 Ch. D. 955; 56 L. J. Ch. 171; 56 L. T. 648, "cousin" was construed to mean the wife of a cousin. In *Mayott* v. *Mayott*, 2 Bro. C. C. 125, a gift to "first and second cousins," where there were no second cousins either at the date of the will or at the death of the testator, was held to mean first cousins and first cousins once removed. See also *Slade* v. *Fooks*, 9 Sim. 386; 8 L. J. Ch. 41; *In re Bonner*, 19 Ch. D. 201; 51 L. J. Ch. 83; 45 L. T. 470; *Wilks* v. *Bannister*, 30 Ch. D. 512; 54 L. J. Ch. 1139; 53 L. T. 247. In *Silcox* v. *Bell*, 1 S. & S. 301; 24 R. R. 173, first cousins twice removed were held entitled under a gift to relations who could prove themselves to be either "first or second cousins or their representatives"; and this was followed in *Charge* v. *Goodyear*, 3 Russ. 140; 27 R. R. 42; but both

**Notes to Prec. 10.**

these cases were disapproved by Jessel, M. R., in *In re Parker*, 15 Ch. D. 528; 49 L. J. Ch. 587; 43 L. T. 115. Under a bequest to "first cousins or cousins german" the children of first cousins did not take, the "cousins german" being considered as explanatory of, or merely synonymous with the "first cousins," *Sanderson* v. *Bayley*, 4 M. & C. 56; 48 R. R. 8. In *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 541; 74 R. R. 153, it was held that under a gift to "second cousins" those only who had either the same great-grandfather or great-grandmother were second cousins. In *In re Parker*, 17 Ch. D. 262; 50 L. J. Ch. 639; 44 L. T. 885, children or grandchildren of first cousins were excluded from a gift to "second cousins," where there existed second cousins capable of taking the gift. It appears from these cases that although the construction of the words has not been uniform, the tendency of later decisions has been to give them their strict meaning unless there are no person answering to the strict description.

"family."

That "family" is a flexible term, see *Blackwell* v. *Bull*, 1 Ke. 176; 44 R. R. 52. It may, in a devise of freehold estates, mean the heir-at-law, *Lucas* v. *Goldsmid*, 29 Be. 657; 30 L. J. Ch. 935; 4 L. T. 632; though that is not its natural meaning; it may mean the next of kin, and either living at testator's death, or at the death of some other person, *Green* v. *Marsden*, 1 Drew. 646; 22 L. J. Ch. 1092; 94 R. R. 789. The primary meaning of the word in a will is "children," *Re Terry's Will*, 19 Be. 580; 105 R. R. 254; *Burt* v. *Hellyar*, L. R. 14 Eq. 160; 41 L. J. Ch. 430; 26 L. T. 833; *Pigg* v. *Clarke*, 3 Ch. D. 672; 45 L. J. Ch. 849. Where there is an immediate absolute legacy for the benefit of "A.'s family," the children of A., and those only, to the exclusion of A. himself, are entitled, *Barnes* v. *Patch*, 8 Ves. 604; 7 R. R. 127; a legacy by a married man to his family is a gift to his children, to the exclusion of his wife, *Re Hutchinson and Tenant*, 8 Ch. D. 540; 39 L. T. 86; and where a legacy is given to trustees for a married woman and her family, the married woman and her children are entitled, to the exclusion of her husband, *M'Leroth* v. *Bacon*, 5 Ves. 166; 5 R. R. 11. The context of the will must in each case determine the intended recipients under this general term, and in the absence of anything to show the testator's intention, the word "family" will be taken to be (when applied to personalty) synonymous with "kindred" or "relations," and bequests to a person's "family" will be construed by the same rules as bequests to "relations." Generally, therefore, the next of kin according to the Statute of Distributions will be entitled, see 1 Rop. Leg. 100—119; *Re Parkinson*, 1 Sim. N. S. 242; 20 L. J. Ch. 224; 89 R. R. 78; *Williams* v. *Williams*, 1 Sim. N. S. 358; 20 L. J. Ch. 280; 89 R. R. 121; *Lees* v. *Massey*, 3 D. F. & J. 113; 4 L. T. 36; *Eagles* v. *Le Breton*, L. R. 15 Eq. 148; 42 L. J. Ch. 362; *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; 42 L. J. Ch. 383; 28 L. T. 397; and as to a power to distribute a fund among relations, see *Finch* v. *Hollingsworth*, 21 Be. 112; 25 L. J. Ch. 55; *Salusbury* v. *Denton*, 3 K. & J. 529; 26 L. J. Ch. 851; *Re Caplin's Will*, 2 Dr. & S. 527; 34

"relations."

**Notes to Prec. 10.**

L. J. Ch. 578; 12 L. T. 526. In *Snow* v. *Teed*, L. R. 9 Eq. 622; 39 L. J. Ch. 420; 23 L. T. 303, a power to a spinster to appoint a fund amongst "her own family or next of kin" was held not to be confined to statutory next of kin, but to include any relation.

Where in a will a word descriptive of persons has a clear and definite meaning when used in one part, but has not when used in another, there is a presumption that the word is intended to bear the same meaning in the latter case as in the former, *In re Birks*, '00, 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741.

(*f*) A devise or bequest to a man and his wife and to a third person is construed as a gift of a moiety to the husband and wife, and of the other moiety to the third person, this rule having been founded on the doctrine that husband and wife were, for most purposes, one person. But any indication, however slight, of an intention that each shall take separately has been held to defeat the application of the rule, *Bricker* v. *Whatley*, 1 Vern. 233; *Warrington* v. *Warrington*, 2 Hare, 54; 62 R. R. 21; *In re Wylde*, 2 D. M. & G. 724; 22 L. J. Ch. 87; 95 R. R. 307; *Dias* v. *De Livera*, 5 App. Cas. 123; 49 L. J. P. C. 26; 42 L. T. 267; *In re March*, 27 Ch. D. 166; 54 L. J. Ch. 143; 51 L. T. 380. Kay, J., held, in *Re Jupp*, 39 Ch. D. 148; 57 L. J. Ch. 774; 59 L. T. 129, that the rule has not been altered by the Married Women's Property Act, 1882, in the case of wills made since the Act came into operation; as between the husband and the wife, however, the Act operates to give the wife one half of the share taken by the husband and wife as her separate property, the other half going to the husband. See comments by North, J., upon *Re Jupp*, in *Re Dixon*, 42 Ch. D. 306; 61 L. T. 718.

(*g*) See note (*d*), Prec. IX.

(*h*) See note (*g*), Prec. VIII.

Lapse of personal legacies.

Pecuniary charges on land.

Rules under the *old* law.

Charge on contingency which never happens.

(*i*) Legacies payable out of the general personal estate, failing from illegality, or lapsing by the death of the legatee in the testator's lifetime, sink into the residuary personal estate, *Brown* v. *Higgs*, 4 Ves. 708; 4 R. R. 323. The destination of sums payable out of real estate, the gift of which fails under similar circumstances, admits of several important distinctions. The result of the cases, in regard to wills which are subject to the old law, is exhibited in the following propositions:—1*st*. Where a sum of money charged upon land is made payable on a contingency which does not happen, whether such failure of event occurs in the testator's lifetime or afterwards, the legacy becomes extinct for the benefit of the devisee of the land; see *Tregonwell* v. *Sydenham*, 3 Dow. 194; 15 R. R. 40. In this class are to be ranked general charges of debts and legacies, which, as they affect the land, unless a contrary intention appears, only in the event of a deficiency in the personal estate, are to be regarded as contingent charges; see *Noel* v. *Lord Henley*, 7 Pri. 241; 26 R. R. 660. 2*ndly*.

Charge failing by lapse, or void *ab initio*.

Where the gift of a sum of money charged on land fails by lapse, in consequence of the legatee's death in the testator's lifetime, or where lands are charged with a sum of money which is given to a charity or

**Notes to Prec. 10.**

is devoted to some illegal or impracticable purpose, invalidating the gift *ab initio*, the question between the heir and the devisee is involved in much uncertainty. The authorities in favour of the heir are *Arnold* v. *Chapman*, 1 Ves. S. 108; *Bland* v. *Wilkins*, cited 1 Br. C. 60; *Gravenor* v. *Hallum*, 2 Amb. 643; and *Henchman* v. *Attorney-General*, 2 S. & S. 498; but see 3 M. & K. 485; 41 R. R. 102. Those which support the claim of the devisee are *Wright* v. *Row*, 1 Br. C. 60; *Jackson* v. *Hurlock*, 2 Ed. 263; *Barrington* v. *Hereford*, cited 1 Br. C. 60; *Baker* v. *Hall*, 12 Ves. 497; 8 R. R. 366; *Cooke* v. *Stationers' Co.*, 3 M. & K. 262; 41 R. R. 67; *Ridgway* v. *Woodhouse*, 7 Be. 437; 64 R. R. 111; *Re Cooper Trusts*, 4 D. M. & G. 757; 23 L. J. Ch. 25; 102 R. R. 369; *Heptinstall* v. *Gott*, 2 J. & H. 449; 31 L. J. Ch. 776; 7 L. T. 92. Thus the preponderance of the later cases is in favour of the devisee. In *Gravenor* v. *Hallum*, *Wright* v. *Row*, *Barrington* v. *Hereford*, and *Baker* v. *Hall*, the charge was of an annual sum. *3rdly.* The destination of sums directed to be paid out of the produce of real estate devised to be sold, in the event of the gift of such sums failing by lapse or otherwise, is a distinct, and has often formed a no less perplexing topic of judicial consideration. Notwithstanding the conflict of authorities, the better opinion seems to be, that where part of the produce of land devised to be sold is directed to be applied to purposes which fail, either by lapse or on account of illegality, the heir-at-law, and not the residuary devisee of the produce, is entitled to the benefit of the failure, *Jones* v. *Mitchell*, 1 S. & S. 290; *Hutcheson* v. *Hammond*, 3 Br. C. 128; *Collins* v. *Wakeman*, 2 Ves. J. 683; *Gibbs* v. *Rumsey*, 2 V. & B 294; 13 R. R. 88; but see *Page* v. *Leapingwell*, 18 Ves. 463; 11 R. R. 234; *Noel* v. *Lord Henley*, 7 Pri. 240; 26 R. R. 660; 1 Dan. 211, 322; see also *Doe* v. *Sheffield*, 13 Ea. 527; *Williams* v. *Goodtitle*, 10 B. & C. 895. *4thly.* Where money, arising from land directed to be sold, is given over on an event which does not happen, it descends to the heir, *Jessopp* v. *Watson*, 1 M. & K. 665; 2 L. J. Ch. 197; see also *Fitch* v. *Weber*, 6 Ha. 145; 17 L. J. Ch. 361; 77 R. R. 56; *Roberts* v. *Walker*, 1 R. & M. 752; 32 R. R. 318. *5thly.* Where the testator has blended the produce of his real estate, directed to be converted, with his personal estate, this has, in many cases, been considered sufficient to exclude the heir, in favour of the residuary legatee of the mixed fund, from all benefits arising from the lapse or failure *ab initio* of legacies payable out of the mixed fund: the testator, in such a case, was considered to have indicated an intention that the destination of the lapsed or void legacies should be regulated by the rule applicable to personalty, *Mallabar* v. *Mallabar*, Ca. t. Talb. 79; *Durour* v. *Motteux*, 1 Ves. S. 320; *Kennell* v. *Abbott*, 4 Ves. 802; 4 R. R. 351; *Green* v. *Jackson*, 2 R. & M. 238; 34 R. R. 75; *Cooke* v. *Stationers' Co.*, 3 M. & K. 262; 41 R. R. 67; and see *Spencer* v. *Wilson*, L. R. 16 Eq. 501; 42 L. J. Ch. 754; 29 L. T. 19. But in order to give the benefit of the failure to the residuary legatee the direction to convert the realty into personalty must be absolute; it must be expressly declared that such conversion

Benefit of failure, to the devisee.

Lands directed to be sold, gift out of proceeds lapsing or void,

the heir entitled to benefit of failure.

Gift, on contingency not happening, to the heir.

Realty and personalty blended;

benefit of failure to the residuary legatee,

where the conversion is absolute.

**Notes to Prec. 10.**

is to be for all purposes and to all intents, or if the intention that the proceeds of the conversion should pass under the residuary bequest of personalty is left to inference, it will be inferred only from expressions irresistibly leading to such a conclusion; see *Maughan* v. *Mason*, 1 V. & B. 410; 12 R. R. 251. A mere direction to sell land for a particular purpose (notwithstanding the cases previously cited) is not a sufficient indication of a testator's intention to convert realty into personalty to all intents; for the cases of *Collins* v. *Wakeman*, 2 Ves. 683; *Gibbs* v. *Rumsey*, 2 V. & B. 294; 13 R. R. 88; and *Amphlett* v. *Parke*, 2 R. & M. 221; 34 R. R. 61, decide that, even though the real and personal estate are blended, lapsed or void legacies, so far as they arise from the sale of the realty, result to the heir-at-law. See also *Salt* v. *Chattaway*, 3 Be. 576; 10 L. J. Ch. 234; *Taylor* v. *Taylor*, 3 D. M. & G. 190; 22 L. J. Ch. 742. 6*thly*. Where the gift of the residue of the proceeds of real estate directed to be sold, or an aliquot share in such residue, fails whether as void *ab initio*, or subsequently from lapse, the heir is clearly entitled as against the next of kin, *Ackroyd* v. *Smithson*, 1 Br. C. 503. The conversion directed is held to be a conversion for the purposes of the will; and those purposes having failed, the testator dies intestate as to the residue, which, as arising from real estate, descends to the heir-at-law. "Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, viz.: the heir and next of kin" (1 Jarm. Wills, 589). Thus in *Fitch* v. *Weber*, 6 Ha. 145; 17 L. J. Ch. 361; 77 R. R. 56, notwithstanding a direction in the will that the trustees should stand possessed of the proceeds of the sale of real estates as a fund of personal and not of real estate, for which purpose such proceeds, or any part thereof, should not, in any event, lapse or result for the benefit of the heir-at-law, it was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. The case of *Phillips* v. *Phillips*, 1 M. & K. 649; 1 L. J. Ch. 214, is against the claim of the heir; but is now overruled by *Taylor* v. *Taylor*, 3 D. M. & G. 190; 22 L. J. Ch. 742; 98 R. R. 104. See further, on this contest between the heir-at-law and next of kin, the argument of Lord Eldon (then Mr. Scott) characterised by Lord Cottenham as one of the ablest arguments ever addressed to any Court, in *Ackroyd* v. *Smithson*, 1 Br. C. 503; in 1 Wh. & Tud. L. C. Eq., and the note of the learned editors. 7*thly*. A distinction has been taken between the cases where land is devised charged with the payment of a sum of money, and those where the devise is only an exception from the general residuary devise: "If a devise to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit

But when this is not the case,

lapsed or void legacies, so far as arising from sale of realty, result to the heir.

Failure of gift of residue of proceeds of realty directed to be sold.

Conversion for the purposes of the will only.

Intestacy, as to lapsed or void portions of residue.

Distinction between a charge upon, and an exception from a devise.

**Notes to Prec. 10.**

of the failure," *Cooke* v. *Stationers' Co.*, 3 M. & K. 264; 41 R. R. 67. See also *Re Cooper's Trusts*, 4 D. M. & G. 757; 23 L. J. Ch. 25; 102 R. R. 369; *Tucker* v. *Kayess*, 4 K. & J. 339; *Heptinstall* v. *Gott*, 2 J. & H. 449; 31 L. J. Ch. 776; 7 L. T. 92. This, it will be observed, is consistent with what has been laid down in the earlier part of this note.

Present law as to gifts of land lapsing or failing.

In such a conflicting state of the authorities, the subject to which they relate seemed not undeserving the attention of the framers of the Wills Act, which accordingly fixed the destination of the interests in question in certain cases, see sect. 25, *ante*, p. 62. The following supposed case will supply a simple illustration of the application of the statutory provision. A testator, by a will made on or after the 1st of January, 1838, devises certain lands to A. in fee, charged with the payment of 500*l.* to B., and gives his residuary real estate to C.; B. dies in the testator's lifetime: the legacy of 500*l.* is clearly an interest in land within the meaning of the statute, and, as such, unless a contrary intention appears by the will, devolves to C., the general residuary devisee, instead of being, as formerly, a subject of contention between the testator's heir and A., the devisee of the charged lands.

What cases not within the Act.

If, however, the will contains no residuary devise, the enactment does not apply and the question may still occur (as formerly) between the old competitors, the heir and the devisee of the land. It is evident, therefore, that the Wills Act has not entirely prevented the occurrence of the perplexing questions adverted to in the present note, even under wills made after 1837. It should be observed, also, that the statute does not apply, where a sum of money charged upon land is payable on a contingency which does not happen; for as the failure of the gift of the money is owing to the failure of the event on which it is to take effect, there is no undisposed-of interest on which the statute can operate. In the event which has occurred, the land is not charged at all, and the devisee takes it in the same manner as if no charge had been inserted in the will. Compare prop. 1 of this note, *ante*, p. 206.

As to the effect of a direction that a gift of a share of residue which fails shall sink into the residue, see *Lightfoot* v. *Burstall*, 1 H. & M. 546; 33 L. J. Ch. 188; *Crawshaw* v. *Crawshaw*, 14 Ch. D. 817; 49 L. J. Ch. 662; 43 L. T. 309; *In re Barker's Estate*, 15 Ch. D. 635; *In re Rhoades*, 29 Ch. D. 142; 54 L. J. Ch. 573; 53 L. T. 15; *In re Ballance*, 42 Ch. D. 62; 58 L. J. Ch. 534; 61 L. T. 158; *Re Palmer*, '93, 3 Ch. 369; 62 L. J. Ch. 988; 69 L. T. 477, overruling *Humble* v. *Shore*, 7 Hare, 247; 33 L. J. Ch. 188, *n.*; 82 R. R. 95; *In re Parker*, '01, 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116; *In re Allan*, '03, 1 Ch. 276; 72 L. J. Ch. 159; 88 L. T. 246; *In re Wand*, '07, 1 Ch. 391; 76 L. J. Ch. 253; 96 L. T. 425.

See also, as to the doctrine of lapse, 1 Jarm. Wills, ch. xi., and the notes to *Elliot* v. *Davenport*, 1 P. W. 83, in Tud. L. C. R. P.

(*k*) See note (*f*), Prec. VI.

**Prec. 11.**

## No. XI.

WILL *of a* BACHELOR, *disposing of Real Estate in favour of collateral Relations.—Specific and Pecuniary Legacies and Life Annuities.—Various Trusts declared of several of the Pecuniary Legacies and Annuities, in favour of Nephews and Nieces and other collateral Relations.—Trust for an Imbecile.—Residue divided among Testator's Brothers and Sisters, and settled on them and their Families; with cross Limitations between the Stocks: and with ultimate Limitations to the Brothers, and to the Appointees and Next of Kin of the Sisters, of their respective original Shares.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I REVOKE all other testamentary dispositions AND I APPOINT [*names &c.*] to be executors and trustees of this my will I DESIRE that my body may be buried in the family vault at —— with plainness and privacy I DEVISE the freehold messuage lands and hereditaments at —— in the county of —— which I lately purchased from [*name*] to my brother [*name*] in fee simple I DEVISE my freehold farm called —— in the parish of —— in the county of —— which descended to me as heir-at-law of my uncle [*name*] unto my brother [*name*] for his life without impeachment of waste and on his death to his son my nephew [*name*] in fee simple I DEVISE all my freehold hereditaments in the county of —— unto my brother [*name*] for his life without impeachment of waste And on his decease to his wife [*name*] for her life without impeachment of waste And on her death to their four children [*names*] equally as tenants in common in tail with cross-remainders (*a*) between them in tail With remainder to my nephew [*name*] in fee simple I DEVISE my freehold dwelling-house at —— in the parish of —— now in the occupation of my sister [*name*] to my said sister [*name*] so

Burial and funeral.

Devise in fee.

Devise for life;

—remainder in fee.

Devise for life;

—remainder for life;

—remainder to several in common in tail, with cross-remainders;

—remainder in fee.

**Prec. 11.**

long as she shall occupy the same as her usual residence (*b*) and keep the same in tenantable repair and insured in the sum of £ —— at least against loss by fire And on the determination of her estate to such of her daughters [*names*] as being spinsters or a spinster shall occupy the same as their or her usual residence and shall keep the same in tenantable repair and insured as aforesaid so long as they or she shall so occupy and keep the same And on the determination of their or her estate To such persons for such estates and in such manner as my last-mentioned sister shall by any deed or deeds or by her last will appoint And in default of appointment To her son [*name*] in tail And on failure of his issue to her daughters equally (*c*) as tenants in common in fee simple I DEVISE my freehold hereditaments at —— in the county of —— now in the occupation of [*name*] as tenant from year to year to my nephews (*d*) [*names*] equally as tenants in common in fee simple with cross executory devises between them so that in the event of any of them dying under the age of twenty-one years without leaving issue the same hereditaments may go to the others as tenants in common or the other of them in fee simple And in the event of their all so dying as to one undivided third part of the same hereditaments To my cousin [*name*] in fee simple and as to the two remaining undivided third parts thereof To my cousins [*names*] in equal shares as tenants in common in fee simple I DEVISE my freehold hereditaments at —— in the county of —— now in the occupation of [*name*] as tenant under a lease granted to him by me to my nieces [*names*] equally as tenants in common for life with cross-remainders between them for life without impeachment of waste And on the death of the survivor of them To such persons for such estates and in such manner as such survivor either before or after her survivorship shall be ascertained shall by her will appoint And in default of such appointment To my trustees hereinbefore named in fee simple UPON TRUST after the devise to them shall vest in possession to sell the same hereditaments and to receive the sale moneys and the rents until sale and pay the surplus thereof after deducting their expenses to or among such of the children of my last-mentioned nieces living

Devise to one for personal residence;

—remainder to several, being spinsters, for personal residence:

—remainder in tail;

—remainder in fee.

Devise to several in common in fee, with cross-limitations, and a limitation over in thirds.

Devise to several in common for life, with cross-remainders;

—as survivor shall appoint;

—remainder to trustees, to sell and pay produce to children and issue living at death of survivor, *per stirpes*;

**Prec. 11.**

at the death of the survivor of them and such of the issue then (*e*) living of their children then dead as either before or after the decease of such survivor shall being males or a male attain the age of twenty-one years or being females or a female attain that age or be married to take if more than one as tenants in common in a course of distribution according to the stocks and not to the number of the individuals the issue of a deceased child taking by substitution as tenants in common the share only which their parent would if living have taken And if there shall not be any such child or issue then to dispose of the same sale moneys as part of the residue of my personal estate hereinafter bequeathed and to dispose of the same rents as part of the yearly income of such residue

—if none, to add the same to residue of personal estate.

Devise to several in common for life;

I DEVISE all my other freehold hereditaments in the said county of —— to my four nieces [*names*] in equal shares for their respective lives without impeachment of waste And on the death of each niece as to her share To the children of the same niece living at her death and the issue then living of her children then dead in fee simple to take if more than one as tenants in common according to the stocks and not to the number of the individuals the issue of a deceased child taking by substitution as tenants in common the share only which their parent would if living have taken And if there shall not be any such child or issue Then to such person for such estates and in such manner as my same niece shall by her will appoint And in default of such appointment to the others of my same nieces respectively in equal shares for the same estates and with the same subsequent limitations (including the cross-limitation) as are herein expressed concerning their respective original shares And as to the entirety of the same hereditaments on failure of all the limitations hereinbefore expressed To my said brothers [*names*] as joint tenants in fee simple I DEVISE my close called —— situate at —— to the said [*trustees*] TO THE USE and intent that out of the rents and profits thereof my nephew [*name*] may receive during his life but subject to the proviso hereinafter contained an annuity or yearly sum of £—— by weekly payments of £—— each on Saturday in every week the first of such payments to be made on the first Saturday after my death (*f*) And subject to the

—to the children and issue of tenant for life, *per stirpes*, in fee;

—remainder as tenant for life shall appoint, with cross-limitations between the tenants for life and their issue.

Devise of rentcharge payable weekly;

—of land, so charged, to husband and wife jointly in fee;

said annuity To the joint use of my brother-in-law [*name*] and my sister [*name*] his wife in fee simple PROVIDED that if by reason of the act or default of the said [*annuitant*] or by operation of law the said annuity of £—— or any part thereof shall be aliened charged or disposed of to or in favour of any other person or persons so that the said [*annuitant*] would be deprived of the personal enjoyment thereof or of any part thereof then the same annuity shall thenceforth be paid to my said brother-in-law [*name*] and [*name*] his wife I BEQUEATH my leasehold tenements at —— in the county of —— which I now hold under a lease from [*name*] to my brother [*name*] for such term as I may have therein at my death subject to the payment of the rent and performance of the covenants under which the same tenements may be held I BEQUEATH my leasehold tenements at —— in the county of —— which I now hold under a lease from [*name*] to my brother [*name*] for his life if such term as I may have therein at my death shall so long endure he paying the rent and performing the covenants under which the same tenements may be held And on his decease if such term shall be then unexpired To my nephew [*name*] for the then residue of the same term subject to the payment of the same rent and performance of the same covenants I DEVISE AND BEQUEATH the residue of the freehold hereditaments and leasehold tenements which shall belong to me at my death to my said brother [*name*] as to the freehold hereditaments in fee simple and as to the leasehold tenements for such terms as I may have therein respectively at my death subject to the payment of the rents and performance of the covenants under which the same may be respectively held but charged as to both the freehold and leaasehold premises with the payment to my executors or administrators at the end of three calendar months from my decease of the sum of £—— to be disposed of as part of the residue of my personal estate hereinafter bequeathed I DECLARE that my executors shall not be entitled to any apportioned part of the rent current at my decease of any of my freehold and leasehold hereditaments and tenements hereinbefore disposed of I BEQUEATH the specific legacies following (namely) To my brother [*name*] my gold watch with the chain and seals requesting but not

—charge to cease on alienation.

Bequest of leaseholds to one absolutely.

Bequest of leaseholds to one for life, remainder absolutely.

Residuary devise and bequest of freeholds and leaseholds, to one absolutely, charged with a sum in augmentation of the residue of the personal estate.

Bequest of specific legacies.

**Prec. 11.**

imposing an obligation or creating a trust that he will leave them at his death to my nephew [*name*] (*g*) To my nephew [*name*] all the printed books and manuscripts which shall belong to my library at my decease To my old friend [*name*] my diamond ring as a mark of my esteem To [*name*] my gold snuff-box in testimony of my grateful remembrance of his many professional and friendly services To &c. I BEQUEATH the legacies following (namely) To the Rector for the time being of the parish of —— aforesaid £—— to be distributed at his discretion among such poor inhabitants of that parish not receiving alms or parochial relief as he shall select To the Treasurer for the time being of the —— Infirmary in aid of that institution £—— for which the receipt of such Treasurer shall be a sufficient discharge To my nephew [*name*] or if he shall die in my lifetime [*or where it is doubtful whether the legatee be living or not*, or if he is now dead or shall die in my lifetime] then to his executors or administrators (*h*) to be disposed of as part of his personal estate £—— To such of my nephews and nieces [*names*] as shall be living at my death and if more than one equally £—— To each of the children of my deceased nephew [*name*] who either before or after my death shall attain the age of twenty-one years or marry £—— with power for my executors or administrators to apply the whole or part of the legacy of each child while such legacy shall be contingent for the advancement in life or otherwise for the benefit of the same child during minority (*i*) To each of my nephews and nieces [*names*] the children of my said brother [*name*] by his late wife [*name*] the sum of £—— to be vested in and payable to each nephew as and when he shall attain the age of twenty-one years and to be vested in and payable to each niece as and when she shall attain that age or be married AND I DIRECT each of the last-mentioned legacies to be if vested and payable paid or if not retained and set apart at the end of three calendar months next after my death but without interest in the meantime and if retained and set apart to be invested in the names of my trustees (*k*) with power to vary the investment from time to time for any other or others of the like nature and the yearly produce thereof to be paid

Bequest of pecuniary legacies;

—to charitable uses;

—to one, or on death, in testator's lifetime, to his executors or administrators;

—to classes of persons,

with power to advance minors.

Legacy to each of several infant nephews and nieces, with a direction to pay the income to the father for maintenance, without account, and after his death to apply it;

**Prec. 11.**

into the hands of my said brother [*name*] during the minority of the nephew or the minority and discoverture of the niece to whom the same shall belong in order that such yearly produce may be applied by my said brother at his discretion for the benefit of such nephew or niece and without his being obliged to render any account of the application thereof AND I DECLARE that if any of my said nephews shall die under the age of twenty-one years or any of my said nieces shall die under that age without having been married then the legacy of each of them so dying and the unapplied yearly produce and accumulations thereof if any shall sink into the residue of my personal estate I BEQUEATH to my said trustees three sums of 500*l.* 1,000*l.* and 2,000*l.* upon the trusts hereinafter declared thereof respectively To each of my executors £—— as an acknowledgment for the trouble of executing my will To the said [*one of the executors*] individually and without reference to his office (*l*) £—— To each of my friends [*names*] £—— to purchase a mourning ring or other memorial [*or* To each &c. a mourning ring of the value of £——] To my servant [*name*] if he shall continue in my service till my death £—— To each of the domestic servants who shall be in my service at my death (except the said [*name*]) a sum equal to one year's wages (*m*) in addition to the wages then due to him or her also a suit of mourning to be provided by my executors at their discretion I DIRECT the legacies of such of the pecuniary legatees as at the time of the actual payment thereof respectively shall be married women to be paid into their respective proper hands in order that the same may be enjoyed and disposed of as their separate property (*n*) I BEQUEATH the legacies of stock following (namely) To my said trustees 3,000*l.* Two and a half per Cent. Consolidated Stock also 4,000*l.* Two Pounds Fifteen Shillings per Cent. Annuities also 5,000*l.* Two Pounds Ten Shillings per cent. Annuities also 6,000*l.* Three per Cent. Metropolitan Consolidated Stock upon the trusts hereinafter declared thereof respectively Also to my nephew [*name*] 1,000*l.* Bank Stock I DIRECT my executors to deliver the specific legacies aforesaid within one calendar month after my death and to pay or retain the money (*o*) and stock legacies

—to trustees, of several sums of money upon trusts after declared;

—to executors, for their trouble;

—to individual executor;

—to friends, for rings;

—to servants.

Legacies to married women to be their separate property.

Bequest of stock legacies.

Time fixed for delivery of legacies.

**Prec. 11.**

Trusts of a pecuniary legacy—to invest and accumulate till a nephew attains twenty-one, then to transfer the fund to him.

Trusts of another pecuniary legacy for a reputed son—if he dies under twenty-one without leaving issue, to sink into residue.

Trusts of another pecuniary legacy.

—for a cousin for life—for his children—advancement.

Trusts of a stock legacy

aforesaid within six calendar months after my death or sooner if they shall think fit I DIRECT my trustees to stand possessed of the said legacy of 500*l.* money UPON TRUST to invest the same in their names and to accumulate the yearly income by similar investments until my nephew [*name*] shall attain the age of twenty-one years or die under that age and if he shall attain that age thereupon to transfer to him both the original fund and the accumulations but if he shall die under that age then to dispose thereof as part of the residue of my personal estate I DIRECT my trustees to stand possessed of the said legacy of 1,000*l.* money IN TRUST for my reputed son [*name*] (*p*) but if he shall die under the age of twenty-one years without leaving issue the same legacy shall sink into the residue of my personal estate AND I DIRECT my trustees to invest the same legacy in their names I EMPOWER them during the minority of the said [*reputed son*] to apply so much not exceeding one-half as they shall think fit of the capital of the same legacy for his advancement in life or otherwise for his benefit I DIRECT my trustees to stand possessed of the said legacy of 2,000*l.* money UPON TRUST with the consent in writing of my cousin [*name*] and after his death in the discretion of my trustees to invest the same legacy in their names AND to permit the said [*cousin*] during his life to receive the annual income of the same legacy or the investment thereof and after his death as to as well the capital of the same legacy or investment as the annual income thereof thenceforth to accrue due IN TRUST for the child if only one or all the children if more than one of the said [*cousin*] who either before or after his death shall attain the age of twenty-one years or marry and if more than one equally And with power for my trustees with the consent in writing of the said [*cousin*] and after his death in their discretion to apply so much not exceeding one-half as they shall think fit of the capital of the share of each child while such share shall be contingent for the advancement in life or otherwise for the benefit of the same child And if no child of the said [*cousin*] shall attain the age of twenty-one years or marry then (subject to the powers aforesaid) the same legacy with the accumulations shall sink into the residue of my personal estate I DIRECT my trustees to

**Prec. 11.**

stand possessed of the said legacy of 3,000*l.* Two and a half per Cent. Consolidated Stock IN TRUST for my niece [*name*] if she shall attain the age of twenty-one years or be married with the previous consent in writing of her guardian or guardians but if she shall die under that age without having been married with such consent as aforesaid the same legacy shall sink into the residue of my personal estate AND I DIRECT my trustees to apply the dividends of the same legacy during the minority and discoverture of my said niece for her maintenance and education or at their option to pay the same to her guardian or guardians to be so applied but for whose due application thereof my trustees shall not be responsible

—for a niece at twenty-one, or marriage with consent—interim dividends to be applied for her maintenance.

I DIRECT my trustees to stand possessed of the said legacy of 4,000*l.* Two Pounds Fifteen Shillings per Cent. Annuities UPON TRUST at any time or from time to time to apply the whole or such part as my trustees shall think fit of the capital or the income or both for the personal maintenance and support or otherwise for the personal benefit (*r*) of my nephew [*name*] or to pay the same or such part thereof as they shall think fit to any person or persons to be so applied without liability on the part of my trustees to inquire into the application thereof or at the option of my trustees to pay the whole or such part as they shall think fit of the capital or the income or both to my executors or administrators to be disposed of as part of the residue of my personal estate to the intent that my trustees may be enabled to adapt the disposition of the fund to the circumstances for the time being of my said nephew and thereby to secure as far as possible his personal enjoyment thereof and prevent the same from becoming the property of his alienees or creditors with power for my trustees to invest in their names so much of the fund as shall from time to time remain unapplied and to accumulate the same by repeated investments of the dividends but so that the accumulations shall not be carried beyond the period of twenty-one years from my decease AND I DECLARE that so much of the capital income and accumulations as shall remain in the hands of my trustees at the death of my said nephew shall fall into the residue of my personal estate I DIRECT my trustees to stand possessed of

Trusts of a stock legacy —for the personal maintenance of a nephew, to be applied at the discretion of trustees, or, at their option, disposed of as part of the residue.

Trusts of another stock

**Prec. 11.**

legacy—for the children of a sister, postponing the distribution, in order to let in all the children—maintenance and advancement.

the said legacy of 5,000*l.* Two Pounds Ten Shillings per cent. Annuities IN TRUST for the children of my sister [*name*] who either before or after her death shall attain the age of twenty-one years or marry in equal shares but the distribution of the capital to be postponed till my said sister shall die or attain the age of [*fifty*] years [*or* till my said sister shall die *or* till she shall have attained the age of [*fifty*]] years and my trustees shall in writing under their hands declare that there has ceased to be any probability (*s*) of the birth of a future child or children of my said sister] in order that no child attaining the said age or marrying may in the ordinary course of nature be excluded (*t*) and I DIRECT my trustees to apply the income of the contingent share of each child whether liable to reduction by an increase in the number of objects or not for his or her maintenance and education or at the option of my trustees to pay the same income to my said sister to be so applied by her but without liability to account AND I EMPOWER my trustees to apply so much not exceeding one-half as they shall think fit of the capital of the share of each child whether vested or contingent and whether liable to reduction by an increase in the number of objects or not for his or her advancement in life or otherwise for his or her benefit AND I DIRECT the income of the share of each child whose share shall be vested or of so much thereof as shall not be applied as last aforesaid to be paid to such child during the postponement of the distribution I DIRECT my trustees to stand possessed of the said legacy of 6,000*l.* Three per Cent. Metropolitan Consolidated Stock UPON TRUST to divide the same into four equal shares and to settle the yearly produce of one of such shares on each of my four nieces [*names*] in such manner as the counsel of my trustees shall advise and approve as most effectual for securing to her the personal receipt and enjoyment thereof during her life inalienably (the costs of such settlement to be defrayed out of the said yearly produce) and after her death as to her share and the yearly produce thenceforth to accrue due for the same IN TRUST for her children equally or her child (as the case may be) who either before or after her death shall being a son or sons

Advancement.

Trusts of stock standing in testator's name for four nieces and their children, with cross-limitations, and a direction to settle the income to their separate use.

attain the age of twenty-one years or being a daughter or daughters attain that age or be married And if any of my four last-mentioned nieces shall not have any child who shall being a son attain the age of twenty-one years or being a daughter attain that age or be married then as to as well the share or shares originally limited to the niece or nieces not having any such child as last aforesaid as the share or shares limited to such niece or nieces by this cross executory limitation IN TRUST for the others in equal shares or the other of my said four nieces for their or her respective lives or life and after their or her respective deaths or death for their or her respective children or child in manner hereinbefore expressed respecting her or their original share or respective shares And if none of my said four nieces shall have any child who shall being a son attain the age of twenty-one years or being a daughter attain that age or be married then the whole fund shall sink into the residue of my personal estate I DIRECT the sum of £—— to be invested within three calendar months after my death in the purchase in the names of my trustees of an annuity from the Government Commissioners to be payable during the life of my nephew [*name*] and to be held by my trustees UPON TRUST in their discretion and of their uncontrolled authority to manage and administer the said annuity and to pay and apply the whole or such portion only of the said annuity as they shall think expedient to or for the clothing board lodging maintenance and support or otherwise for the personal and peculiar benefit of my said nephew during his life (whether infant or adult and whether competent or incompetent to give an acquittance or discharge) at such time or times in such portions and in such manner in all respects as my trustees shall think most conducive to his comfort and convenience AND I DECLARE that if my said nephew shall die before the investment of the said sum by my trustees in the purchase of an annuity as aforesaid or if at his death any portion of the annuity shall remain in the hands of my trustees unapplied to the purposes of the trust last aforesaid then the uninvested or unapplied money shall sink into the residue of my personal estate I BEQUEATH the annuities following (*a*) (namely)

Direction to purchase a Government annuity to be applied at the discretion of trustees, as a personal provision.

Bequest of annuities;

**Prec. 11.**

—to one for life;

—to two and the survivor;

—to one for two joint-lives;

—to trustees, for life of a nephew, in trust for him till alienation, &c., and then for his wife and children;

-for the life of a married niece, for her separate use, inalienably.

Direction as to payment of annuities;

—funds to be set apart for answering annuities.

Directions to executors to pay legacy duty.

To [*name*] an annuity of £—— for his life To [*name*] and [*name*] his wife and the survivor of them for their lives and the life of the survivor an annuity of £—— To [*name*] an annuity of £—— for the joint lives of himself and his father [*name*] To my trustees an annuity of £—— for the life of my nephew [*name*] UPON TRUST to pay the same annuity to my last-mentioned nephew until he shall do commit or permit some act or default whether voluntary or involuntary which if the trust for payment to him of the same annuity were to continue would be inconsistent with his personal enjoyment of the whole benefit of such trust and thenceforth to apply the same annuity for the maintenance or otherwise for the benefit of his wife and children for the time being or any of those objects in such manner as my trustees shall in their discretion think fit so long as there shall be any such objects in existence and after such act or default and failure of such objects as aforesaid the same annuity shall cease To my trustees an annuity of £—— for the life of [*name*] the wife of [*name*] IN TRUST for her but so that during her present coverture my trustees shall pay the same as the portions thereof shall accrue due and not by way of anticipation into her proper hands and for her separate use I DIRECT that the annuities aforesaid shall be paid in equal portions quarterly AND I DIRECT my executors to appropriate or purchase in their names within six calendar months after my death funds in the Two and a Half per Cent. Consolidated Stock or Two Pounds Fifteen Shillings per Cent. Annuities or both (but not in or upon any other investment or security) sufficient at the period of appropriation to answer by means of the dividends thereof the payment of the said annuities respectively (which funds on the death of the respective annuitants shall fall into the residue of my personal estate) and in the meantime until such appropriation to pay the said annuities out of my general personal estate I DIRECT my executors to pay the legacy duty and incidental expenses chargeable on the specific pecuniary and stock legacies and the annuities aforesaid so that the legatees and annuitants may receive the full amount thereof (*v*) AS TO the residue of my personal estate (including the said sum of £—— with which

**Prec. 11.**

my residuary freehold and leasehold estates are hereinbefore charged) I BEQUEATH the same to my trustees upon the trusts following (namely) As to one equal third part of the said residue UPON TRUST with the consent in writing of my elder brother [*name*] and [*name*] his wife or the survivor of them and after the decease of such survivor in the discretion of my trustees to invest the same in the names of my trustees AND UPON FURTHER TRUST to empower the said [*elder brother*] during his life and after his death the said [*wife*] his wife during her life to receive the annual income of the same third part and after the death of the survivor of them as to as well the capital as the income thereof IN TRUST for the child if only one or all the children if more than one of the said [*elder brother*] who either before or after the determination of the previous trusts shall attain the age of twenty-one years or marry and if more than one equally With power for my trustees with the consent in writing of the said [*brother*] and [*wife*] or the survivor and after the death of the survivor in the discretion of my trustees to apply so much not exceeding one-half as my trustees shall think fit of the share of each child whether vested or contingent for his or her advancement in life or otherwise for his or her benefit AND as to one other third part of the said residue UPON SUCH TRUSTS and with such powers in favour of my younger brother [*name*] and [*name*] his wife and his child or children as shall correspond with the preceding trusts and powers in favour of the said [*elder brother*] and [*wife*] and his child or children AND as to one equal moiety of the remaining third part of the said residue UPON TRUST to permit my sister [*name*] the wife of [*name*] to enjoy the annual income thereof for her life but so that during her coverture my trustees shall pay such income as the same shall become due and not by way of anticipation into her proper hands and for her separate use And after her death UPON TRUST to pay the annual income thereof to her said husband for his life and subject to the trusts aforesaid as to as well the capital as the income thereof UPON SUCH TRUSTS and with such powers in favour of the child and children of my same sister as shall correspond with the trusts and powers hereinbefore

Bequest of residue to trustees.

As to one-third—to invest—income to a brother for life—his wife for life—capital to their children—advancement.

Advancement.

As to another third—similar trusts (by reference) for another brother and his family.

As to one moiety of the remaining one-third—income to a sister for her separate use for life—to husband for life—capital to her children (by reference).

**Prec. 11.**

As to the other moiety of the same third—similar trusts (by reference) for another sister and her family.

declared in favour of the child and children of my said elder brother [*name*] AND as to the other equal moiety of the same third part UPON SUCH TRUSTS and with such powers in favour of my sister [*name*] the wife of [*name*] and her said husband and her child or children as shall correspond with the trusts and powers hereinbefore partly declared and partly referred to concerning the first-mentioned moiety of the same third part I DIRECT that each of my said sisters shall have power by will to appoint all or any part of the income of her said moiety to be paid to any after-taken husband who shall survive her for his life I FURTHER DIRECT that on failure of the trusts of either moiety of the same third part such moiety shall be subject to the trusts and powers affecting the other moiety I FURTHER DIRECT that on failure of the trusts of any of the said third parts the part or parts whereof the trusts shall so fail with all accretions thereto under this clause shall be added to the other or to the others equally [*or if the division be unequal*, rateably or apportionably according to the original division] of the said third parts and be subject to the trusts and powers hereinbefore declared or referred to concerning the part or respective parts to which the same shall attach AND I FURTHER DIRECT that on failure of all the trusts hereinbefore declared of the residue of my personal estate the share thereof originally limited in favour of each of my said brothers shall belong to him absolutely and the share thereof originally limited in favour of each of my said sisters shall be subject to her testamentary appointment and in default of such appointment be divisible on her death among her then next of kin (exclusive of a husband) in a course of distribution according to the statutes I EMPOWER my trustees to exercise their judgment and discretion in regard to the conversion of such parts of the residue of my personal estate (including shares in joint stock companies) as shall not be of a perishable or determinable nature and I declare that the yearly proceeds of such parts thereof as they may accordingly permit to remain unconverted shall be deemed yearly income for the purposes of the trusts hereinbefore declared of such residue I DECLARE that the expression "my trustees" used by me in this my will shall be

Cross-limitations between the two sisters and their families;

—between the brothers and sisters and their families.

Ultimate disposition of the residue—the shares of brothers to them absolutely—sisters to their testamentary appointees or next of kin.

Discretion as to conversion.

Power to appoint trustees—

construed as comprising and referring to the trustees or trustee for the time being of this my will I DECLARE that if both of my trustees herein named shall die in my lifetime or shall refuse to accept the trusts of my will it shall be lawful for my said brother [*name*] or his executors or administrators for the time being [*or* for my executors or administrators for the time being] to appoint within six calendar months after my decease a fit person or fit persons to supply the vacancies occasioned by such deaths (*x*) And on every appointment under the preceding power the appointed trustees shall be considered as coming in under my will in the same manner as if they had been herein named instead of the deceased trustees IN WITNESS &c.

providing for death in testator's lifetime, and disclaimer.

**NOTES to Precedent XI.**

(*a*) The common form of limiting cross-remainders runs thus:—"And in case the issue of any of the said children shall fail, then as to as well the original share or shares of the child or children whose issue shall so fail, as the share or shares to which such child or children may become entitled under this limitation of cross-remainders, to the use of the others or other of the said children, and if more than one, in equal shares," &c. The language of this form, however, has arisen from an inaccurate conception of the nature of cross-remainders, under which there is a present limitation to each (present in point of interest, though future in point of enjoyment) of vested estates tail, more or less remote, in the shares of all the rest; so that each child *in esse* is tenant in tail of the whole; namely, as to one share, either in possession or in remainder immediately expectant on the estates, if any, limited prior to the limitation to the children, and as to the other shares in remainder, expectant on those estates, if any, and on the estates tail of the other children. The proximate share, and the more remote shares of each, are in effect, and (it is conceived) ought to be in express terms, limited over, on failure of his or her issue, to all the rest; just as, in the ordinary course of limiting successive estates tail, Blackacre is limited to A. in tail, and, on failure of his issue, to B. in tail. Sometimes, with yet more inaccuracy, the words "survivors or survivor" are substituted for, or used in addition to, the words "others or other." The principle of these observations extends to cross executory limitations by way of use or trust. In general, the imperfections of such limitations, especially in wills, are helped by the Court; and, indeed, it would be difficult to frame a short and comprehensive form of this kind, expressive of the whole technical import and effect of cross-remainders, in terms so rigidly and critically correct as not to require any liberality of construction. In a devise, however, all difficulty may be avoided by those who are content to adopt the summary form in the text. See *In re Rubbins*, 78 L. T. 218.

As to the mode of limiting cross-remainders.

"Survivors or survivor."

**Notes to Prec. 11.**

(*b*) See note (*f*), Prec. XXVIII.

(*c*) That the words "equally," "equally to be divided," "to be distributed in joint and equal proportions," "share and share alike," "respectively;" and to several "between" or "amongst" them, or to "each" of several persons, will create a tenancy in common in a will, see Jarm. Wills, 1121. As to a direction that younger children should "participate" with the eldest son, see *Liddard* v. *Liddard*, 28 Be. 266; 29 L. J. Ch. 619; 2 L. T. 200; as to the word "participate," see also *Robertson* v. *Fraser*, L. R. 6 Ch. 696; 40 L. J. Ch. 776. As to joint-tenancy and tenancy in common, see *Morley* v. *Bird*, 3 Ves. 629; 4 R. R. 106; and the notes on that case in Tud. L. C. R. P.; 2 Jarm. Wills, Ch. XXXII.; *Morgan* v. *Britten*, L. R. 13 Eq. 28; 41 L. J. Ch. 70; *Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128; 41 L. J. Ch. 167; 25 L. T. 892.

Tenancy in common.

Joint-tenancy.

(*d*) See note (*e*), Prec. X.

(*e*) Sometimes clauses, letting in the issue of children dying before a prescribed period, fail to express that the issue are to be substituted only in case they also outlive the period in question. A point of extreme nicety then arises, namely, whether the qualification expressly engrafted on the gift to the children is, by implication, to be extended to their issue. After great conflict of authorities, it has been decided that the substituted issue (in the absence of a contrary intention manifested by the context) are not required to outlive the period of distribution, *Martin* v. *Holgate*, L. R. 1 H. L. 175; 35 L. J. Ch. 789; *In re Woolley*, '03, 2 Ch. 206; 72 L. J. Ch. 602; 89 L. T. 16; see also Jarm. Wills, Ch. XXX.; Hawkins, Constr. Wills, 253. Where the gift to the issue is substitutional, no interest vests in issue who predecease their parent, *Crause* v. *Cooper*, 1 J. & H. 207; *Humfrey* v. *Humfrey*, 2 Dr. & S. 49; 31 L. J. Ch. 622; 6 L. T. 13; *Re Orton's Trusts*, L. R. 3 Eq. 375; 36 L. J. Ch. 279; 16 L. T. 146; *Hurry* v. *Hurry*, L. R. 10 Eq. 346; 39 L. J. Ch. 824; 22 L. T. 577; see also *Selby* v. *Whittaker*, 6 Ch. D. 239; 47 L. J. Ch. 121; 37 L. T. 514; *In re Ibbetson*, 88 L. T. 461; though if the gift is an original and not a substitutional one, it is not necessary that the issue survive their parent, *Re Smith's Trusts*, 7 Ch. D. 665; 47 L. J. Ch. 265. And notwithstanding that the children take as tenants in common, the substituted issue will, in the absence of words of severance repeated in the gift to the issue, take in joint-tenancy amongst themselves, *Coe* v. *Bigg*, 1 N. R. 536. See note (*g*), Prec. XVIII.

Whether substituted issue are, like their parents, to outlive a period of distribution.

In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate," it was held, upon the construction of the will, that "becoming entitled" meant becoming entitled in possession, not becoming entitled in interest, *In re Maunder*, '03, 1 Ch. 451; 72 L. J. Ch. 367; 88 L. T. 280.

(*f*) It is no longer necessary to insert powers of distress for the recovery of rentcharges, as these are now supplied by the Conveyancing Act, 1881, s. 44.

(*g*) Words of request, entreaty, recommendation and desire, addressed

**Notes to Prec. 11.**

Precatory words, effect of, to create a trust.

to a devisee or legatee, respecting the destination of the property which is the subject of gift, may possess the force of an obligation. To prevent this consequence, which probably is seldom intended, and, still more, to prevent the litigation which such questions too often engender, it should always be distinctly shown that the devisee's discretion is not to be fettered by the injunction imposed upon his conscience, or, if the contrary is intended, a trust should be unequivocally created. Thus, such words as "will and desire," *Eeles* v. *England*, 2 Ver. 466; "request," *Eade* v. *Eade*, 5 Mad. 118; 21 R. R. 284; "wish and request," *Foley* v. *Parry*, 5 Sim. 138; 39 R. R. 163; "recommend," *Tibbits* v. *Tibbits*, 19 Ves. 663; 23 R. R. 79; "entreat," *Prevost* v. *Clarke*, 2 Mad. 458; "not doubting," *Parsons* v. *Baker*, 18 Ves. 476; "in the fullest confidence," *Wright* v. *Atkyns*, 17 Ves. 255; 13 R. R. 199; *Shovelton* v. *Shovelton*, 32 Be. 143; "authorise and empower," *Brown* v. *Higgs*, 4 Ves. 708; 4 R. R. 323; "well know," *Briggs* v. *Penny*, 3 M'N. & G. 546; 87 R. R. 192; and others of similar import, have been held to be imperative and to amount to a trust. See *Malim* v. *Keighley*, 2 Ves. 333, 531; 2 R. R. 229; not followed, *In re Hamilton*, '95, 2 Ch. 370; 64 L. J. Ch. 799; 72 L. T. 748; *Reeves* v. *Baker*, 18 Be. 372; 23 L. J. Ch. 599; 104 R. R. 470; *Williams* v. *Williams*, 1 Sim. N. S. 358; 20 L. J. Ch. 280; 89 R. R. 121; *Bernard* v. *Minshull*, Joh. 286; 28 L. J. Ch. 649; *Knight* v. *Knight*, 3 Beav. 148; 52 R. R. 74; affirmed, 11 Cl. & F. 513; and *Irvine* v. *Sullivan*, L. R. 8 Eq. 673; 38 L. J. Ch. 635. But the latest decisions indicate a disposition in the judges of the present day not to carry the doctrine a step beyond the limits assigned to it by their predecessors; and in *Lambe* v. *Eames*, L. R. 6 Ch. 597; 40 L. J. Ch. 447; 25 L. T. 175, it was said that "the officious kindness of the Court of Chancery in interposing trusts," where none were intended had been "a very cruel kindness:" the Court has in fact seized hold of words explanatory of the testator's intention to make, or of his reason for making, an absolute gift, and has used them to cut down the absolute gift. It is not necessary, to exclude a legatee from a beneficial interest, that an effectual trust shall be created; it is only necessary that it clearly appears that a trust was intended. In *Curnick* v. *Tucker*, L. R. 17 Eq. 220, and *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414, it was held that trusts were created; but in *Mackett* v. *Mackett*, L. R. 14 Eq. 49; 41 L. J. Ch. 704; *In re Bond*, 4 Ch. D. 238; 46 L. J. Ch. 488; *Stead* v. *Mellor*, 5 Ch. D. 225; 46 L. J. Ch. 880; 36 L. T. 498; *Re Hutchinson and Tenant*, 8 Ch. D. 540; 39 L. T. 86; *Parnall* v. *Parnall*, 9 Ch. D. 96; and *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321; 51 L. J. P. C. 72; 46 L. T. 633, that trusts were not created. The current of modern authority has set strongly against holding particular expressions to impose precatory trusts. Recent authorities have established that in considering whether a precatory trust is constituted, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed, *Re Adams and the Kensington Vestry*, 27 Ch. D. 394; 54 L. J. Ch. 87; 51 L. T. 382;

The doctrine not now to be extended.

**Notes to Prec. 11.**

*In re Diggles*, 39 Ch. D. 253; 59 L. T. 884; *In re Hamilton*, '95, 2 Ch. 370; 64 L. J. Ch. 799; 72 L. T. 748; *In re Williams*, '97, 2 Ch. 12; 66 L. J. Ch. 485; 76 L. T. 600; *In re Jones*, '98, 1 Ch. 438; 67 L. J. Ch. 211; 78 L. T. 74; *In re Oldfield*, '04, 1 Ch. 549; 73 L. J. Ch. 433; 90 L. T. 392. But see *Comiskey* v. *Bowring-Hanbury*, '05, App. Cas. 84; 74 L. J. Ch. 263; 92 L. T. 241. Very little reliance can be placed upon the older authorities, many of which are only of value in so far as they may serve as warnings to the draftsman to avoid similar forms of expression. See also *Mexborough (Earl)* v. *Savile*, 88 L. T. 131.

A testator, after appointing his wife sole executrix and giving her a life interest in his property, continued as follows: "I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." It was held that parol evidence was not admissible to explain the testator's wishes, and that, subject to the widow's life estate, there was an intestacy, *In re Hetley*, '02, 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265.

See further on the subject of implied trusts, and powers in the nature of a trust, 1 Jarm. Wills, Ch. XII. sect. 5; and the notes to *Harding* v. *Glyn*, 1 Atk. 469, in 2 Tud. L. C. Eq.

Gift to "legal" or "personal representatives," or to "executors or administrators," how construed.

(*h*) The construction of gifts to "legal" or "personal representatives," or to "executors or administrators," has been the subject of much controversy; the questions being (1) whether the gift to representatives applies to executors or administrators, or to the next of kin; and if to the former, then (2) whether the executors or administrators take the property beneficially, or only as part of the personal estate of the testator.

That the words "representatives" means the same as "legal personal representatives," see *Re Crawford*, 2 Drew. 230; 23 L. J. Ch. 625; 100 R. R. 103; *Atherton* v. *Crowther*, 19 Be. 448; 105 R. R. 205; *Re Henderson*, 28 Be. 656. And that "legal representatives," "personal representatives," or "legal personal representatives," ordinarily and *primâ facie* mean "executors or administrators," see *Price* v. *Strange*, 6 Mad. 159; 22 R. R. 266; *Smith* v. *Barneby*, 2 Col. 728; 70 R. R. 376; *Re Turner*, 2 Dr. & S. 501; 34 L. J. Ch. 660; 12 L. T. 695; *In re Ware*, 45 Ch. D. 269; 59 L. J. Ch. 717; 63 L. T. 52; Hawkins, Constr. Wills, 106. But the expressions "personal" and "legal representatives" are not necessarily identical in meaning, *Kilner* v. *Leech*, 10 Be. 362; 16 L. J. Ch. 503. See also *Topping* v. *Howard*, 4 De G. & S. 268, and *In re Roberts*, '03, 2 Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505.

Executors or administrators not entitled for their own benefit.

To hold the executors or administrators to be beneficially entitled is so manifestly contrary to the probable intention, that the case of *Evans* v. *Charles*, 1 Anst. 128, in which this construction prevailed, has been generally condemned; the judge whose solitary approbation it has elicited did not think proper to follow its authority; see *Long* v. *Blackall*, 3 Ves. 486; 4 R. R. 73; and it is now overruled by several later cases. See *Long* v. *Watkinson*, 17 Be. 471; 21 L. J. Ch. 844; 99 R. R. 244; *Ellcock* v. *Mapp*, 3 H. L. C. 492; 88 R. R. 174; *Read* v.

**Notes to Prec. 11.**

*Stedman*, 26 Be. 495; 28 L. J. Ch. 481; *Williams* v. *Roberts*, 27 L. J. Ch. 177; *In re Valdez's Trusts*, 40 Ch. D. 159; 58 L. J. Ch. 861; 60 L. T. 42. And see *Meryon* v. *Collett*, 8 Be. 386; 14 L. J. Ch. 369, where it was held that the next of kin were entitled under a limitation by deed of a fund "to the executors or administrators" of the settlor "to and for his and their own use and benefit." The absurdity of a man's administrator (who might be a small creditor) taking beneficially is sufficient warrant for a construction favourable to the next of kin.

1 Will. 4, c. 40.

To hold the executors or administrators to be beneficially entitled would be more palpably absurd now that, by express enactment (1 Will. 4, c. 40), executors are excluded from taking beneficially, by virtue of their office, even the undisposed-of personalty of their testator, see *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279; 30 L. J. Ch. 853; 4 L. T. 690; *Barrs* v. *Fewkes*, 2 H. & M. 60; 33 L. J. Ch. 484; 10 L. T. 232; *Bird* v. *Harris*, L. R. 9 Eq. 204; 39 L. J. Ch. 226; 23 L. T. 213; *Chester* v. *Chester*, L. R. 12 Eq. 444; *Travers* v. *Travers*, L. R. 14 Eq. 275. Accordingly, in *Stocks* v. *Dodsley*, 1 Ke. 325, where a testator bequeathed 500*l.* to B. after the death of A., and if B. should die in the lifetime of A., then to such persons as B. should by will appoint, and in default of such appointment, to the executors and administrators of B. absolutely, it was held that the executor of B. did not take beneficially, but was bound to apply the legacy according to the purposes of the will of B. It is, however, a question of intention, to be gathered from the will itself, whether a person is to have a beneficial interest or take as executor, *Williams* v. *Arkle*, L. R. 7 H. L. 606; 45 L. J. Ch. 590; 33 L. T. 187, where the intention of the Act 1 Will. 4, c. 40, was considered. See also *In re Roby*, '08, 1 Ch. 71; 77 L. J. Ch. 169; 97 L. T. 773. This statute applies only as between executors and next of kin, *Hawkins* v. *Hawkins*, 7 Sim. 173; *Taylor* v. *Haygarth*, 14 Sim. 8; 6 L. T. 95; *In re Knowles*, 49 L. J. Ch. 625; 43 L. T. 152. Where, owing to the illegitimacy of the testator, there exist no next of kin, the old law, as it existed before the statute, must still be applied, *In re Bacon's Will*, 31 Ch. D. 460; 55 L. J. Ch. 368; 54 L. T. 150.

Next of kin under the statute take, when.

This question cannot arise, unless it is adjudged that the executors or administrators are the intended objects of the gift, which seems not to be the invariable construction; for, in some cases, a gift to "legal," *Price* v. *Strange*, 6 Mad. 159; 22 R. R. 266, or "personal" representatives, *Robinson* v. *Smith*, 6 Sim. 47; 38 R. R. 78, has been held to apply to next of kin, who, as persons entitled under the Statute of Distributions to the personal estate of the deceased, may be said in a general and popular sense to "represent" him.

"Legal representatives."

In *Bridge* v. *Abbott*, 3 Br. C. 224, which is a leading authority for this construction (see also *Long* v. *Blackall*, 3 Ves. 486; 4 R. R. 73), a testatrix having made a bequest to certain persons, and in case of the death of any of them before her, to their "legal representatives," the next of kin under the statutes were held entitled. So, in *Baines* v. *Ottey*, 1 M. & K. 465; 36 R. R. 352, where a testator gave certain real and

**Notes to Prec. 11.**

"Personal representatives."

personal estate to trustees, in trust for such persons as A., a married woman, should appoint, and in default of appointment for her separate use, and at her decease to convey the real estate to such person as would be the heir-at-law of the said A., and to assign the personal estate to such persons as would be the "personal representatives" of A., the next of kin under the statute were held entitled, see also *Cotton* v. *Cotton*, 2 Be. 67; 50 R. R. 99; *Smith* v. *Barneby*, 2 Col. 728; 70 R. R. 376; *Walker* v. *Marquis of Camden*, 16 Sim. 329; 17 L. J. Ch. 488; 80 R. R. 84; *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359; 36 L. J. Ch. 793; 16 L. T. 767; *Re Grylls's Trusts*, L. R. 6 Eq. 589. In *In re Horner*, 37 Ch. D. 695; 57 L. J. Ch. 211; 58 L. T. 103, "representatives" was held not to mean "executors and administrators," and it was not necessary in the circumstances to decide whether it meant next of kin or descendants, see *In re Clay*, 54 L. J. Ch. 648; 52 L. T. 641.

"Executors and administrators," &c., when words of limitation.

From cases of this class, however, we must carefully distinguish those in which the words "executors and administrators" or "legal representatives" are used as words of limitation, as in the case of a gift to A. and his executors or administrators, or to A. and his legal representatives, which will, beyond all question, vest the absolute interest in A., *Lugar* v. *Harman*, 1 Cox, 250; *Mackenzie* v. *Mackenzie*, 3 M'N. & G. 559; 21 L. J. Ch. 465; *Attorney-General* v. *Malkin*, 2 Ph. 64; 78 R. R. 25; *Re Seymour's Trusts*, Joh. 472; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Devall* v. *Dickens*, 9 Jur. 550; 72 R. R. 778; *Alger* v. *Parrott*, L. R. 3 Eq. 328; *Meryon* v. *Collett*, 8 Be. 386; 14 L. J. Ch. 369; *Hames* v. *Hames*, 2 Ke. 646; 7 L. J. Ch. 123; *Morris* v. *Howes*, 4 Ha. 599; 16 L. J. Ch. 121. See also Co. Litt. 54, b. In *Price* v. *Strange*, 6 Mad. 159; 22 R. R. 266, where a testator devised real estate to his wife during widowhood, and at her death or marriage to trustees to sell; and directed that in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or being a daughter, should have attained that age or be married with consent, then his trustees should, immediately after the receipt of the money arising from the sale of his said real estate, pay and divide the same among such of his children as should be then living, and the legal representative or representatives of such as should be then dead; and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should at that time be entitled to receive their shares, in case he, she, or they had been then living; and if dead, then to his, her, or their legal representatives: Sir J. Leach, V.-C., was of opinion that these words operated as words of limitation, and that a child attaining twenty-three, who died during the widowhood of the wife, took a vested interest. It will be observed, that the construction adopted by Sir J. Leach, in the last case, makes no provision against lapse, and therefore the representatives of a child dying in the testator's lifetime would not have taken by way of substitution. So in the case

**Notes to Prec. 11.**

of *Grafftey* v. *Humpage*, 1 Be. 46; 8 L. J. Ch. 98, where under a bequest to A. and B. and the survivor, for life, and on a certain contingency to such persons as B. should appoint, and in default of appointment to the executors, administrators, or assigns of B., B. was held to be entitled absolutely, see also *Holloway* v. *Clarkson*, 2 Ha. 521.

Whether wife and representatives of next of kin entitled under gift to next of kin or its synonyms.

It is observable that in *Bridge* v. *Abbott*, 3 Br. C. 224, and *Baines* v. *Ottey*, 1 M. & K. 465; 1 L. J. Ch. 210, the question did not arise whether the gift to legal representatives or executors or administrators applied to the next of kin, in the strict and proper acceptation of that term, or to the persons taking the personal estate under the Statutes of Distribution so as to let in the widow of the deceased and the representatives of next of kin, *i.e.* the persons who are, among lineals of every degree, and collaterals of certain degrees of proximity, admitted to stand in the place of and represent their deceased parent or ancestor. It seems to be clear that neither the widow, *Garrick* v. *Lord Camden*, 14 Ves. 372; 9 R. R. 297; *Lee* v. *Lee*, 1 Dr. & S. 85; 29 L. J. Ch. 788; nor the husband, *Milne* v. *Gilbart*, 5 D. M. & G. 510; 23 L. J. Ch. 828; 95 R. R. 300; is entitled under a gift in terms to the next of kin. The claim of the representatives of next of kin under such a gift, however, had been the subject of many conflicting decisions and dicta, until the case of *Elmsley* v. *Young*, 2 M. & K. 82, 780; 4 L. J. Ch. 200, in which the Lords Commissioners decided in favour of the strict construction, and held that, under a gift to next of kin, a surviving brother was entitled, in exclusion of the children of a deceased brother. See also *Withy* v. *Mangles*, 10 C. & F. 215; 10 L. J. Ch. 391; *Avison* v. *Simpson*, Joh. 43; *Rook* v. *Attorney-General*, 31 Be. 313; 31 L. J. Ch. 791; and *Halton* v. *Foster*, L. R. 3 Ch. 505; 37 L. J. Ch. 547; 18 L. T. 623; where under gifts of personalty to "the next of kin" it was held that the nearest of kindred in blood were entitled, and not those who would be entitled under the Statutes of Distribution. And the nearest in blood, if more than one, take as joint tenants, *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359; 36 L. J. Ch. 793; 16 L. T. 767. The terms "next of kin" and "next or nearest of blood" are synonymous, *Cooper* v. *Denison*, 13 Sim. 290; 60 R. R. 346.

Conflicting claims of next of kin and residuary legatee.

In *Scott* v. *Moore*, 14 Sim. 35; 65 R. R. 537, the Court had to decide between the conflicting claims of the next of kin and the residuary legatee of a testator, under a declaration that a trust fund in a certain event should be considered as part of his personal estate, and go in due course of administration; the legatee was held entitled. And see *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76, where a legacy was bequeathed to A., and in case he should die in testator's lifetime (which happened) it was directed that the legacy should devolve upon A.'s "personal representatives"; Sir J. Stuart, V.-C., decided against both the executor and the next of kin of A., and in favour of his residuary legatee.

Gifts to "heirs,"

For the construction of a bequest "to and among my heirs-at-law, share and share alike," see *Ware* v. *Rowland*, 2 Ph. 635; 17 L. J. Ch.

**Notes to Prec. 11.**

"next of kin," &c.

147; 78 R. R. 228. As to the effect of a gift to the next of kin of testator's wife according to the distribution of intestates' effects, where the wife of the testator had a previous life interest, see *Edwards* v. *Saloway*, 2 Ph. 625; 78 R. R. 226; as to the construction of the words "heirs" and "family," as applicable to dispositions of real and personal estate respectively, *White* v. *Briggs*, 2 Ph. 583; 17 L. J. Ch. 196; 78 R. R. 203; of "offspring," *Lister* v. *Tidd*, 29 Be. 618; of "descendants," *Best* v. *Stonehewer*, 34 Be. 66; 34 L. J. Ch. 26; of a gift of stock to "issue male," *Lywood* v. *Kimber*, 29 Be. 38; 30 L. J. Ch. 507; and of a devise to the "first male heir," *Doe* v. *Perratt*, 9 C. & F. 606; the words "eldest son," assisted by the context, held to be words of limitation, *Lewis* v. *Puxley*, 16 M. & W. 733; 16 L. J. Ex. 216; 73 R. R. 701. See also *Thellusson* v. *Lord Rendlesham*, 7 H. L. C. 429; 28 L. J. Ch. 948; *Thellusson* v. *Robarts*, 7 W. R. 563, where "eldest male lineal descendant" was held to mean the eldest in point of line or stock, and not of personal age. On the word "heir" in a bequest of personalty, see *Doody* v. *Higgins*, 2 K. & J. 729; 25 L. J. Ch. 773; *Re Gamboa's Trusts*, 4 K. & J. 756; *Re Rootes*, 1 Dr. & S. 228; 29 L. J. Ch. 868; *Powell* v. *Boggis*, 35 Be. 535; *Re Newton's Trusts*, L. R. 4 Eq. 171; 37 L. J. Ch. 23; *Finlason* v. *Tatlock*, L. R. 9 Eq. 258; 39 L. J. Ch. 422; 22 L. T. 3; *In re Steevens' Trusts*, L. R. 15 Eq. 110; 27 L. T. 480. Where realty and personalty were blended, see *Wingfield* v. *Wingfield*, 9 Ch. D. 658; 47 L. J. Ch. 768; 39 L. T. 227; *Keay* v. *Boulton*, 25 Ch. D. 212; 54 L. J. Ch. 48; 49 L. T. 631; where the bequest was to "the heirs or next of kin of A., deceased," the statutory next of kin took, *Re Thompson's Trusts*, 9 Ch. D. 607; 48 L. J. Ch. 135; where the bequest was to A. for life, and on his decease to his "lawful heir or heirs," the latter words were read literally, *Smith* v. *Butcher*, 10 Ch. D. 113; 48 L. J. 136. As to "heir of my family," see *Tetlow* v. *Ashton*, 20 L. J. Ch. 53; 90 R. R. 741; for gifts to next of kin or descendants of a particular surname, *Carpenter* v. *Bott*, 15 Sim. 606; 16 L. J. Ch. 433; 74 R. R. 161; *In re Roberts*, 19 Ch. D. 520; 45 L. T. 450; a devise to right heirs of the testator's name, *Thorpe* v. *Thorpe*, 1 H. & C. 326; 10 W. R. 778; to "my nearest of kin by way of heirship," *Williams* v. *Ashton*, 1 J. & H. 115; 3 L. T. 148; to "next lawful heirs," *Haslewood* v. *Green*, 28 Be. 1; as to the meaning of "next of kin in the male line," *Sayer* v. *Bradly*, 5 H. L. C. 873; 25 L. J. Ch. 593; 101 R. R. 427; "heirs and assigns of survivor," *Milman* v. *Lane*, '01, 2 K. B. 745; 70 L. J. K. B. 731; 85 L. T. 180; and as to the period of vesting of a devise to the person who "shall be the male relation nearest in blood," to A. the first tenant for life of a series of limitations, *Stert* v. *Platel*, 5 Bing. N. C. 434; 50 R. R. 738. In *In re Amos*, '91, 3 Ch. 159; 65 L. T. 69, a devise to A. "for his life and the life of his heir" was held legally valid, the effect being to give A. an estate during his own life and the life of the person who should be ascertained to be his heir at the time of his death.

On gifts to "family" or "relations" compare the note, *ante*, p. 205;

see also on this subject, and generally on gifts to descendants, issue, next of kin, personal representatives, executors or administrators, and persons of testators's blood and name, 2 Jarm. Wills, Ch. XXIX.

(*i*) An executor is not authorised, without an express direction, to pay even a vested legacy to, or apply it for the benefit of, a minor legatee; still less is he warranted in so dealing with a legacy which (like that in the text) is contingent until the majority of the legatee. But an executor can discharge himself of a legacy which belongs to an infant by paying it, as directed by the stat. 36 Geo. 3, c. 52, s. 32, into the Bank of England, to the account of the legatee. In order to avoid the necessity of resorting to this proceeding, which of course is attended with some expense, it seems in general advisable to give to the executors, where the legacy is small, a power of applying it for the benefit of the legatee during minority, unless the testator chooses absolutely to postpone his bounty until majority.

As to the payment of legacies to minors.

36 Geo. 3, c. 52, s. 32.

(*k*) See note (*b*), Prec. IV.

(*l*) These words are inserted to show that the executor is to have the legacy whether he proves the will or not. See Hawkins, Constr. Wills, 309. The intention on this point should always be indicated in framing legacies to executors. The effect of declaring a legacy to be in consideration of the executor's trouble, and indeed of giving it simply to the executor without any explanatory declaration of the motive, would be to annex the legacy to the office, *Calvert* v. *Sebbon*, 4 Be. 222; 55 R. R. 58; *Slaney* v. *Watney*, L. R. 2 Eq. 418; 35 L. J. Ch. 783; 14 L. T. 657, and this probably is in general the intention. *Secus*, where it is expressed to be as a mark of esteem, *Burgess* v. *Burgess*, 1 Col. 367; 66 R. R. 98; or "as a remembrance," *Bubb* v. *Yelverton*, L. R. 13 Eq. 131, or where it is given to one of the executors exclusively in addition to a previous legacy to all, though the bequest be to them *nominatim*, without any allusion to the office, *Cockerell* v. *Barber*, 2 Russ. 585; 28 R. R. 181. See also *Compton* v. *Bloxham*, 2 Col. 201; 70 R. R. 178; *Hollingsworth* v. *Grasett*, 15 Sim. 52; *Wildes* v. *Davies*, 1 S. & G. 475; 22 L. J. Ch. 495; 96 R. R. 445; *Angermann* v. *Ford*, 29 Be. 349; 4 L. T. 230; *Re Denby*, 3 D. F. & J. 350; 4 Dav. Conv. 95. Where there was a gift of residue to the executors equally, as a recompense for their trouble, and one died in the testator's lifetime, it was held that there was no lapse, and the survivors took the whole, *Knight* v. *Gould*, 2 M. & K. 295; 39 R. R. 212; but where one renounced probate, his share lapsed, *Barber* v. *Barber*, 3 M. & C. 688; 45 R. R. 349. And in *Hoare* v. *Osborne*, 33 L. J. Ch. 586; 10 L. T. 20, where one died in testator's lifetime, and another attested the will, it was held that both shares lapsed. As to what is sufficient acting as executor, or intention to act, see *Lewis* v. *Mathews*, L. R. 8 Eq. 277; 38 L. J. Ch. 510; 20 L. T. 905. In *Jewis* v. *Lawrence*, L. R. 8 Eq. 345, the inequality and the difference in the nature of the subject-matter of two bequests to the persons named as executors rebutted the presumption of the legacy being conditional on the executors proving the will, but the Court of

As to legacies to executors.

**Notes to Prec. 11.**

Appeal in *In re Appleton*, 29 Ch. D. 893; 54 L. J. Ch. 954; 52 L. T. 906, doubted *Jewis* v. *Lawrence*, and held that there is no general rule, that a difference either in the nature or amount of the legacies given to the persons named as executors is of itself sufficient to show that the gifts are not attached to the office. Cotton, L.J., also held (*dubitante*, Fry, L.J.), that parol evidence is admissible to rebut the presumption that the gift is annexed to the office. In *In re Reeve's Trusts*, 4 Ch. D. 841; 46 L. J. Ch. 412; 36 L. T. 906, the presumption was rebutted by the legacy not being payable until the death of tenant for life. Where a testator gave to his trustees, "for their services and collecting of rents, &c.," an annuity of 25*l.*, and they employed a collector of the rents and the chief clerk allowed the trustees in taking their accounts a sum of 80*l.* paid to the collector, they were held not entitled to the annuities, *In re Muffet*, 56 L. J. Ch. 600; 56 L. T. 685.

Bequests to servants.

(*m*) A bequest to testators's "servants" includes those only who are in his service at his death, *Jones* v. *Henley*, 2 Ch. Rep. 162; and who pass their whole time in testator's service; *Townshend* v. *Windham*, 2 Ver. 546; *Thrupp* v. *Collett*, 26 Be. 147; though of course a temporary absence from actual service at the testator's death does not disentitle one otherwise entitled, *Herbert* v. *Reid*, 16 Ves. 486.

A bequest "to each of my servants one year's wages over and above what may be due to them at the time of my decease," is confined to servants hired by the year, *Booth* v. *Dean*, 1 M. & K. 560; 36 R. R. 377; *Blackwell* v. *Pennant*, 9 Ha. 551; 22 L. J. Ch. 155; 89 R. R. 569; *In re Ravensworth*, '05, 2 Ch. 1; 74 L. J. Ch. 353; 92 L. T. 490. But if the bequest is of a gross sum to be divided amongst the servants, persons continuously employed at weekly wages are included, *Thrupp* v. *Collett, ubi sup.*

A gift to "servants in my domestic establishment," includes only indoor servants, *Ogle* v. *Morgan*, 1 D. M. & G. 359; 91 R. R. 115; *In re Ogilby*, '03, 1 Ir. R. 525; and in *Jones* v. *Henley, ubi sup.*, where the gift was simply "100*l.* a piece to all my servants," it was held that those only were entitled who lived in the house with the testator. But in *Townshend* v. *Windham, ubi sup.*, the expression "such of my servants as shall be living with me at my death," was held not to exclude servants living in a different house; and similar decisions were given in *Blackwell* v. *Pennant* and *Thrupp* v. *Collett, ubi sup.* A bequest "to each man who shall have been in my employ over ten years," *held* to extend to a man who had been in the testator's employ for fifteen years, but who was not in his employment at the time of his death, *Re Sharland*, '96, 1 Ch. 517; 65 L. J. Ch. 280; 74 L. T. 20.

See also *Armstrong* v. *Clavering*, 27 Be. 226; *Darlow* v. *Edwards*, 1 H. & C. 547; 32 L. J. Ex. 51; 6 L. T. 905; *Venes* v. *Marriott*, 31 L. J. Ch. 519; 6 L. T. 892.

(*n*) See note (*f*), Prec. IX.

Bequests of stock.

(*o*) The word "money" in a will does not pass stock in the public funds, unless its meaning is enlarged by the context, *Lowe* v. *Thomas*,

**Notes to Prec. 11.**

5 D. M. & G. 315; 23 L. J. Ch. 616; 101 R. R. 657; *Collins* v. *Collins*, L. R. 12 Eq. 455; 40 L. J. Ch. 541; 24 L. T. 780; *In re Sutton*, 28 Ch. D. 464; or it can be gathered from the whole will, and the facts of the case, that such was the testator's intention, *Chapman* v. *Reynolds*, 28 Be. 221; 29 L. J. Ch. 594; *Gover* v. *Davis*, 29 Be. 222; 30 L. J. 505; *In re Townley*, 53 L. J. Ch. 516; 50 L. T. 394; *In re Cadogan*, 25 Ch. D. 154; 53 L. J. Ch. 207; 49 L. T. 666; *Montagu* v. *Earl of Sandwich*, 33 Be. 324; 9 L. T. 632; *Nevinson* v. *Lady Lennard*, 34 Be. 487. See also *Cowling* v. *Cowling*, 26 Be. 449, where stock in the funds was held not to pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." The addition of "&c." to a bequest like the above will carry only things *ejusdem generis*, *Newman* v. *Newman*, 26 Be. 220; *Barnaby* v. *Tassell*, L. R. 11 Eq. 363; 24 L. T. 221; but where the will shows an intention to dispose of everything, "&c." will carry the whole personal estate, *Chapman* v. *Chapman*, 4 Ch. D. 800; 46 L. J. Ch. 104. South Sea Stock and 3¼ per Cents. were held, on the context, to pass by the expression "surplus money," *Newman* v. *Newman*, 26 Be. 218.

*Et cætera.*

In *Harrison* v. *Asher*, 2 De G. & S. 436; 17 L. J. Ch. 452; 79 R. R. 280, a testator, resident in Jamaica, made a specific bequest of half of certain stock, and afterwards directed his agents in London, who held a power of attorney from him, to sell out part of the stock; the testator died before the sale was made, and the agents, in ignorance of that fact, effected the sale as directed; it was held that the legatee was entitled to half the stock which was standing in testator's name at the time of his death. See also *Thomas* v. *Thomas*, 27 Be. 537; 29 L. J. Ch. 281, in which case the testator left to his grandson "all the bank stock which he should be possessed of or entitled to at the time of his death"; on the 27th Dec., 1858, he directed the purchase of 5,000*l.* bank stock, obviously with a view of increasing the legacy to his grandson; the stock was bought at the earliest possible moment, but the testator died on the day of, but five hours before, the purchase; the grandson was held not to be entitled to the 5,000*l.*

Bank stock.

A bequest of "my bank stock," was held to pass 3¼ per Cents., the testator having no other stock, either at the date of his will, or at his death, *Drake* v. *Martin*, 23 Be. 89; 26 L. J. Ch. 786. But where a testator has stock which answers the description in his will, though different in amount, the description will not be extended so as to include stock of a different description, *Gilliat* v. *Gilliat*, 28 Be. 481. Bank stock is not government security, *Mills* v. *Mills*, 7 Sim. 501; 40 R. R. 176; *Hume* v. *Richardson*, 4 D. F. & J. 29; 31 L. J. Ch. 713; 6 L. T. 624; and in a gift of "the whole of my fortune now standing in the funds," bank stock was held not to be included, *Grainger* v. *Slingsby*, 7 H. L. C. 273; 28 L. J. Ch. 616; nor will it pass under a bequest of "money and securities for monies," *Ogle* v. *Knipe*, L. R. 8 Eq. 434; 38 L. J. Ch. 692; 20 L. T. 867. As to what securities are within the meaning of "stocks in the foreign funds," see *Ellis* v. *Eden*, 23 Be. 543;

**Notes to Prec. 11.**

25 Be. 482. In *Hull* v. *Hill*, 4 Ch. D. 97, Australian bonds did not pass under a bequest of foreign bonds. Long annuities pass as "stock and money in the funds," *Grant* v. *Mussett*, 2 L. T. 133; or as "public funds or government securities," *Wilday* v. *Sandys*, L. R. 7 Eq. 455; 20 L. T. 861.

Foreign funds.

Long annuities.

In the absence of any other bequest of residuary personalty, a bequest of "money that may remain after the payment of my debts" includes the general residue of personalty; and such a bequest of "money" has been held to pass the testator's reversionary interest in a sum charged on real estate, *Stocks* v. *Barré*, Joh. 54. And see *Montagu* v. *Sandwich*, 33 Be. 324; 9 L. T. 632; *In b. White*, 7 P. D. 65; 51 L. J. P. 40; 46 L. T. 695; *In re Egan*, '99, 1 Ch. 688; 68 L. J. Ch. 307; 80 L. T. 153.

Bequest of "money."

"Ready money."

A bequest of "ready money" includes not only cash in the house, but cash at a banker's upon an ordinary account current, *Parker* v. *Marchant*, 1 Ph. 356; 57 R. R. 327; or in a savings-bank, such money being payable on demand or the required notice to pay having been given and the time expired before the testator's death, *Re Powell's Trust*, Joh. 49. But a bequest of "ready money" does not include promissory notes or notes of hand, *ib.* And money on deposit at a bank withdrawable at fourteen days' notice is not "ready money," *In re Wheeler*, '04, 2 Ch. 66; 73 L. J. Ch. 576; 91 L. T. 227; nor is it a "pecuniary investment," *In re Evan Price*, '05, 2 Ch. 55; 74 L. J. Ch. 437; 93 L. T. 44. But a bequest of "moneys owing" will pass money standing to the testator's credit on a deposit account, because the relationship existing between the testator and his banker is that of debtor and creditor, *In re Derbyshire*, 54 W. R. 135. A bequest of money deposited in the post office savings-bank will include consolidated stock bought through the post-office savings-bank with money standing to the credit of the testator's deposit account, *In re Adkins*, 98 L. T. 667.

Where the question is as to what is included in some general popular term or description, it seems impossible to lay down any rule; the intention of the testator must be gathered from the whole instrument. Accordingly, in *Langdale* v. *Whitfield*, 4 K. & J. 426; 27 L. J. Ch. 795, the word "moneys" in a codicil was held to comprise not only money in hand, but moneys due upon securities or otherwise; and this notwithstanding express mention in the will of "moneys and securities for money." As to what is included in a bequest of "money in bank," see *Harper's Trustees* v. *Bain*, 5 F. 716—Ct. of Sess.; and what is a bequest of "securities," see *In re Johnson*, 89 L. T. 520; *In re Rayner*, '04, 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681. See, however, *Williams* v. *Williams*, 8 Ch. D. 789; 47 L. J. Ch. 850; 39 L. T. 180.

See also *Waite* v. *Combes*, 5 De G. & Sm. 676; 21 L. J. Ch. 814; 90 R. R. 194; *Petty* v. *Wilson*, L. R. 4 Ch. 574; *Ogle* v. *Knipe*, L. R. 8 Eq. 434; 38 L. J. Ch. 692; 20 L. T. 867; *Prichard* v. *Prichard*, L. R. 11 Eq. 232; 40 L. J. Ch. 92; 24 L. T. 259; *Collins* v. *Collins*, L. R. 12 Eq. 455; 40 L. J. Ch. 541; 24 L. T. 780; *Martin* v. *Hobson*, L. R. 8 Ch. 401; 42 L. J. Ch. 342; 28 L. T. 427; *Byrom* v. *Brandreth*, L. R. 16

Eq. 475; 42 L. J. Ch. 824; *Bide* v. *Harrison*, L. R. 17 Eq. 76; 43 L. J. Ch. 86; 29 L. T. 451; *In re Pringle*, 17 Ch. D. 819; 50 L. J. Ch. 689; 45 L. T. 11; *In b. Aston*, 6 P. D. 203; 50 L. J. P. 77.

**Notes to Prec. 11.**

Money on deposit at bank.

An I O U, containing no promise to pay, is not a "security for money," *Barry* v. *Harding*, 1 J. & L. 483; 68 R. R. 313; and a banker's receipt for money on deposit is a mere I O U, evidence of a debt but not a security, *Hopkins* v. *Abbott*, L. R. 19 Eq. 222; 44 L. J. Ch. 316; 31 L. T. 820; but a vendor's lien for unpaid purchase-money is a "security for money," *Callow* v. *Callow*, 42 Ch. D. 550; 58 L. J. Ch. 698.

Construction of gifts to illegitimate children.

(*p*) A gift to children or issue *primâ facie* imports legitimate children or issue, *Metham* v. *Duke of Devon*, 1 P. W. 529; 1 V. & B. 462. Hence, in framing provisions for illegitimate offspring, great care should be taken to show plainly and explicitly that they are the intended objects of the gift. And this suggestion loses none of its pertinency where there are no other than illegitimate children in existence at the making of the will; for, as a gift to children generally embraces those who happen to be in existence at the testator's death, without the necessity of inquiring into the previous history of the class, a bequest originally intended for the illegitimates may, by the birth, subsequently to the will, of legitimates, be diverted entirely to such after-born children, see *Godfrey* v. *Davis*, 6 Ves. 43; 5 R. R. 204; *Harris* v. *Lloyd*, T. & R. 310; 24 R. R. 68; *Gabb* v. *Prendergast*, 1 K. & J. 439; 24 L. J. Ch. 431; *Paul* v. *Children*, L. R. 12 Eq. 16; 25 L. T. 82. Thus, suppose A. to marry B. after she has had children of whom A. is reputed father; and after the marriage, but before the birth of legitimate offspring, to make a will bequeathing property to his children by B.; it can scarcely be doubted that the testator intends to provide for the illegitimates as well as any after-born legitimate children, but his intention would be defeated by the birth of a legitimate child, who would take all to the entire exclusion of the illegitimate, *Dorin* v. *Dorin*, L. R. 7 H. L. 568; 45 L. J. Ch. 652; 33 L. T. 281; *Re Ayles' Trusts*, 1 Ch. D. 282; 45 L. J. Ch. 223. See the comments of Stirling, J., on this last case in *In re Horner*, 37 Ch. D. 695; 57 L. J. Ch. 211; 58 L. T. 103.

Gifts to children as a class.

Gifts to illegitimates.

Description including legitimates and illegitimates.

The rule is laid down in *Hill* v. *Crook*, L. R. 6 H. L. 283; 42 L. J. Ch. 714; that "where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children," the latter will be included. This case disposes of the view which obtained previously that legitimate and illegitimate children would not be included under one general gift to children. See *Bagley* v. *Mollard*, 1 R. & M. 581; 32 R. R. 281: *Pratt* v. *Mathew*, 22 Beav. 328; *Re Parker*, '97, 2 Ch. 208; 66 L. J. Ch. 509; 76 L. T. 421; *Re Walker*, '97, 2 Ch. 238; 66 L. J. Ch. 622; 77 L. T. 94. See also *In b. Frogley*, '05, P. 137; 74 L. J. P. 72; 92 L. T. 429;

**Notes to Prec. 11.**

*In re Kiddle*, 92 L. T. 724; *In re Eve*, '09, 1 Ch. 796; 78 L. J. Ch. 388; 100 L. T. 874.

Gifts to illegitimates.

If by no possibility could the gift apply to legitimates, the illegitimates will take, *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; 16 R. R. 193; *Edmunds* v. *Fessey*, 29 Be. 233; 30 L. J. Ch. 279; 3 L. T. 765; *Clifton* v. *Goodbun*, L. R. 6 Eq. 278. In *Laker* v. *Hordern*, 1 Ch. D. 644, a bequest to "all my daughters" was held to take effect in favour of three pre-nuptial daughters, there being no post-nuptial child. *In re Deakin*, '94, 3 Ch. 565; 63 L. J. Ch. 779; 71 L. T. 838, a testator gave his wife a power of appointment amongst her "relations." She was illegitimate to the knowledge of the testator and childless. *Held*, that "relations" meant those persons who would have been her relations if she had been legitimate. But see *In re Wood*, '02, 2 Ch. 542; 71 L. J. Ch. 723; 87 L. T. 316.

Where a testator made a bequest in favour of the daughters of A. (his first cousin once removed), and A. had died seven years before the date of the will, leaving no legitimate, but two reputed daughters, of whom one was living at the date of the will, it was held that, to enable the surviving daughter to take under the bequest, it was not sufficient to show that there was at the date of the will no possibility of legitimate daughters, and that the lady in question was a reputed daughter, but that evidence must be given from which the testator's knowledge of those facts might be inferred, *Re Herbert's Trusts*, 1 J. & H. 121; 29 L. J. Ch. 870.

In *In re Hastie's Trusts*, 35 Ch. D. 728; 56 L. J. Ch. 792; 57 L. T. 168, a gift to testator's four natural children by M. E. M., viz., J., C., E., and J. H., and all and every other children which might be born of M. E. M., after the date of the will and before the death of the testator, was held to include the future illegitimate children who came into being before testator's death. See *In Re Loveland*, '06, 1 Ch. 542; 75 L. J. Ch. 314; 94 L. T. 336.

Bastard takes not as child of his father, but by virtue of being reputed such;

The intention to include an illegitimate child (*i.e.*, a child *in esse*) in a bequest must be manifest on the face of the will, *Harris* v. *Lloyd*, T. & R. 310; 24 R. R. 68. A bastard cannot take by the description of child of his reputed father until he has acquired the reputation of being such child, *Metham* v. *Duke of Devon*, 1 P. W. 529; 1 V. & B. 462; he takes, not as a child by claim of kindred, but by virtue of his reputation that he is such child: having acquired the reputation, the words in the will serve the purpose of identification, and designate the person. See also *Wilkinson* v. *Adam*, 1 V. & B. 462; 12 R. R. 255; 14 R. R. Pref. 10; *Hill* v. *Crook*, L. R. 6 H. L. 265; 42 L. J. Ch. 702; *In re Haseldine*, 31 Ch. D. 511; 54 L. T. 322; *In re Horner*, 37 Ch. D. 695; 57 L. J. Ch. 211; 58 L. T. 103; *In re Harrison*, '94, 1 Ch. 561; 63 L. J. Ch. 385; 70 L. T. 868.

—born at date of will;

Where the illegitimate children who are the intended objects of bounty have acquired names by reputation, they may be described by those names, see *Rivers' Case*, 1 Atk. 410; and the additional designation

**Notes to Prec. 11.**

Gifts to illegitimates.

of them as children, reputed children, or even as legitimate children, will not invalidate the gift, but be mere redundancy, *Standen* v. *Standen*, 2 Ves. 589. There being no doubt as to the identity of the person intended, he takes as *persona designata*, and whether he was born in wedlock or not is immaterial, *Thomson* v. *Eastwood*, 2 App. Cas. 215. If the children have not acquired names by reputation, and are of such tender age that they have not acquired the reputation of being the children of their supposed father, it will be well to describe them as the children of the mother, or by the place where or the persons with whom they reside, or other such particulars. If the object of the gift be a child *en ventre sa mère*, it should be described as the child of the mother alone, as the child with which A. B. is now pregnant, without making any reference to the supposed father, which would only introduce uncertainty into the description, *Gordon* v. *Gordon*, 1 Mer. 141; 15 R. R. 88; *Earle* v. *Wilson*, 17 Ves. 528; 11 R. R. 130. And see *Holt* v. *Sindry*, L. R. 7 Eq. 170; 38 L. J. Ch. 126; 19 L. T. 669. Whether a child *en ventre* at a testator's death can have the reputation of being his child, *quære*, *In re Bolton*, 31 Ch. Div. 542; 55 L. J. Ch. 398; 54 L. T. 396. In this case the class of children to take were defined in the will only by reference to their paternity, and the gift failed. See also *In re Du Bochet*, '01, 2 Ch. 441; 70 L. J. Ch. 647; 84 L. T. 710.

—*en ventre sa mère*;

A bequest cannot be made by a man to his future illegitimate children simply, for they can have acquired no title by repute; and it has been held that a gift to the future illegitimate children of a woman is invalid not by reason of any doubt as to identification, but on grounds of public policy, *Pratt* v. *Mathew*, 22 Be. 328; *Medworth* v. *Pope*, 27 Be. 71; 28 L. J. Ch. 905; *Howarth* v. *Mills*, L. R. 2 Eq. 389; 14 L. T. 544. But these cases were reviewed in *Occleston* v. *Fullalove*, L. R. 9 Ch. 147; 43 L. J. Ch. 297; 29 L. T. 785, where the testator had gone through the ceremony of marriage with M., the marriage being then illegal, who had two children, C. and E., by him, and at the date of his will was pregnant of a third child, which was born before the testator's death, and was acknowledged by him as his child: under a bequest upon trust for M. for life, and after her death for his reputed children C. and E., and all other the children which he might have *or be reputed to have* by the said M. then born or thereafter to be born, it was held that the after-born child was entitled to share with the two who were in existence at the date of the will. The result is that though a bequest to the future illegitimate children of a man is void for uncertainty (since the actual paternity cannot be ascertained), this objection does not apply to the future illegitimate children of a woman (the maternity being ascertainable); a bequest to the illegitimate children of a particular woman who shall be the reputed children of the testator is neither void for uncertainty nor as being contrary to public policy; and a bequest to the children who are reputed such at the time of the testator's death is no more uncertain than a bequest to those who are reputed such at the date of the will. Public policy having nothing to do with the matter

—to be begotten *in futuro*.

**Notes to Prec. 11.**

Gifts to illegitimates.

the question is reduced to one of intention as expressed in the will and of evidence to establish the reputation and show that the after-born child answers the description of the persons intended to take; and a gift by a testator or testatrix to his or her unborn illegitimate child by a particular person is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix, *Re Goodwin's Trust*, L. R. 17 Eq. 345; 43 L. J. Ch. 258.

However, the proper, and only certainly efficacious, mode of extending to illegitimate children unborn at the date of the will gifts contained in it, is by executing a codicil after the birth of each such child, expressly communicating to him or her the benefit of the disposition in the will; for the mere recognition in the codicil of the child as the testator's own, will not suffice to entitle such child to take under a gift in the will to children generally, *Arnold* v. *Preston*, 18 Ves. 288.

Description of bastard as a "child."

Even a gift in the will itself to an illegitimate child, by the description of the child, *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; 42 L. J. Ch. 383; 28 L. T. 397; or grandchild, *Bagley* v. *Mollard*, 1 Russ. & My. 581; *Megson* v. *Hindle*, 15 Ch. D. 198; 43 L. T. 551; or niece, *In re Brown*, 58 L. J. Ch. 420, of the testator will not enable such child, grandchild, or niece to share in another bequest to children or grandchildren, or nieces generally, unless there is a plain and clear inference from the terms of the will that they were intended to take, *Meredith* v. *Farr*, 2 Y. & C. C. 525; 60 R. R. 255; *Evans* v. *Davies*, 7 Ha. 498; 18 L. J. Ch. 180; 82 R. R. 211; *In re Humphries*, 24 Ch. D. 691; 49 L. T. 594; *In re Bryon*, 30 Ch. D. 110; 55 L. J. Ch. 30; *In re Smilter*, '03, 1 Ch. 198; 72 L. J. Ch. 102; 87 L. T. 644. In *Worts* v. *Cubitt*, 19 Be. 421; 105 R. R. 197, where there was a gift for the benefit "of A. my natural daughter and of all other my daughters," followed by a residuary bequest to "all my daughters," A. was held entitled to share in the residue. So, where a testator, who had one illegitimate nephew J., one illegitimate nephew W., and no niece, gave a legacy to "his nephew J," and his residuary estate to the children of his "nephews and nieces," the children of J. participated in the residue, *Tugwell* v. *Scott*, 24 Be. 141. And where a testator, who was illegitimate, had lived with and treated all his brothers and sisters as lawful relatives, although they were also illegitimate, made a bequest to "all my nephews and nieces" living at a certain period, the whole of the children of his natural brothers and sisters were included in the bequest, including those of a deceased natural sister, who was not referred to by name, *In re Corsellis*, '06, 2 Ch. 316; 75 L. J. Ch. 607; 95 L. T. 583. The son of A. (A. being a natural son of the testator) was described in a will as testator's "grandson," it was held that a daughter of A. was included in a gift to "grandchildren," *Allen* v. *Webster*, 2 Gif. 177; 2 L. T. 206. And illegitimate children of an unmarried sister of the testator, described in the will by her maiden name, but who afterwards married, were held entitled to share in a legacy to her "and her two youngest daughters," *Savage* v. *Robertson*, L. R. 7 Eq. 176. The mere description in one part of a will

**Notes to Prec. 11.**

Gifts to illegitimates.

of an illegitimate child of testator's brother J. W., as "nephew," will not entitle such illegitimate child to take under a bequest in another part of the will to the "children" of testator's brothers E. H. and J. W., *In re Hall*, 35 Ch. D. 551; 56 L. J. Ch. 780; 57 L. T. 42. And see *Wilson* v. *Atkinson*, 4 D. J. & S. 455; 33 L. J. Ch. 576; 11 L. T. 220, as to the effect, in a settlement, of a declaration that A., an illegitimate, should, for the purposes of the trusts, be deemed a lawful child.

Additional cases on illegitimacy.

In addition to the cases already cited, reference may be made to the following: *Mortimer* v. *West*, 3 Rus. 370; 27 R. R. 98; *Cartwright* v. *Vawdry*, 5 Ves. 530; 5 R. R. 108; *Swaine* v. *Kennerley*, 1 V. & B. 469; 12 R. R. 269; *Durrant* v. *Friend*, 5 De G. & S. 343; 21 L. J. Ch. 353; 90 R. R. 103; *Re Overhill's Trusts*, 1 S. & G. 362; 22 L. J. Ch. 485; 96 R. R. 413; *Warner* v. *Warner*, 15 Jur. 141; 20 L. J. Ch. 273; 90 R. R. 753; *Kelly* v. *Hammond*, 26 Be. 36; *Mason* v. *Bateson*, 26 Be. 404; 28 L. J. Ch. 391; *Ellis* v. *Houston*, 10 Ch. D. 236; *In re Fish*, '94, 2 Ch. 83; 63 L. J. Ch. 437; 70 L. T. 825; all cases in which illegitimates were excluded from the benefit of bequests; and to the following: *Evans* v. *Davies*, 7 Ha 498; 18 L. J. Ch. 180; 82 R. R. 211; *Owen* v. *Bryant*, 2 D. M. & G. 697; 21 L. J. Ch. 860; 95 R. R. 289; *Hartley* v. *Tribber*, 16 Be. 510; 96 R. R. 245; *Evans* v. *Massey*, 8 Pri. 22; 22 R. R. 691, a child *en ventre sa mère*; *Re Brown's Trust*, L. R. 16 Eq. 239; 28 L. T. 616; in which bastards were, on construction of the context, held entitled. See also Jarm. Wills, Ch. XXXI.

Illegitimacy with reference to the legacy duty.

An illegitimate child is a "stranger in blood" to the predecessor or testator, and therefore pays legacy and succession duties at the highest rate.

Bequests to reputed wives, or concubines.

The principle above stated, that where the illegitimate children are sufficiently identified as the intended recipients of a gift, the addition of a misdescription (such as a designation of them as children, or legitimate offspring) will not invalidate the gift, applies likewise to the mothers of such children: for, provided the testator's intention be clear as to the person to be benefited, and his description of her sufficient for identification, the additional designation of her as his "wife" will not prevent a woman not legally his wife from taking the gift intended for her. Thus, a bequest to "my dear wife Caroline" has been held to apply to a woman with whom the testator was then living, and with whom he had gone through the ceremony of marriage in the lifetime of his legal wife, *Doe* v. *Rouse*, 5 C. B. 422; 75 R. R. 771; *Dilley* v. *Matthews*, 2 N. R. 60; 8 L. T. 762. In *Pratt* v. *Mathew*, 22 Be. 328, the words "my wife" were held to be a *designatio personæ* of the lady with whom the testator was living, and with whom he had gone through the ceremony of marriage, but which marriage was void on account of the lady being the sister of testator's deceased wife. Difficulties as to marriage with a deceased wife's sister cannot arise since the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII., c. 47). In *Smith* v. *Charles* (V.-C. Kindersley, December, 1864), a gift to "my

**Notes to Prec. 11.**

wife A. during her life if she shall so long continue my widow, but not otherwise," the marriage being void as within the prohibited degrees of consanguinity, was read as a gift to A. until marriage, see also *Lepine* v. *Bean*, L. R. 10 Eq. 160; 39 L. J. Ch. 847; 22 L. T. 833. In *Re Pitts*, 27 Be. 576, where there was a bequest to "my wife," but upon the death of the testator it was discovered that the husband of his supposed wife was alive, as twenty years had elapsed since she left her legal husband, and before she went through the ceremony of marriage with the testator, and as she had apparently been guilty of no wilful misconduct, and there was not sufficient evidence to show that she did not believe herself *bonâ fide* a widow when she married the testator, it was held that the bequest was good. But a bequest to "my wife A.," who at the time of the marriage ceremony between her and the testator had to her knowledge a husband living, and had falsely represented herself to be a widow, was, on the ground of the fraud committed by her, held void, *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319; 35 L. J. Ch. 684; 14 L. T. 394; whilst a bequest by the same testator to "my step-daughter S.," an innocent legatee, was supported, see also *Turner* v. *Brittain*, 3 N. R. 21; *Melhuish* v. *Milton*, 3 Ch. D. 27; 45 L. J. Ch. 836.

Fraud, legacy void.

As to restraints on alienation.

(*r*) The law of England does not allow the owner of property to bestow it on another deprived of its incidents. Of these incidents the right of alienation is one of the most important, and it has been guarded with a jealousy natural in a commercial country, whose obvious policy it is to promote the free circulation and interchange of property. Hence it has become an established doctrine, that where real and personal estate is given to a man during his life, or for any definite estate or interest of greater or less extent, accompanied with the strongest injunction against his aliening it, the prohibition is nugatory, and the devisee or legatee enjoys unfettered his disposing power, see *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4. Upon a similar principle, and for reasons of policy still more obvious, the most positive and emphatic expression of a wish to devote the property to the personal and exclusive benefit of the devisee or legatee does not, in the event of his becoming bankrupt, prevent it from devolving to the trustees in whom the law in such case has vested his general property, *Brandon* v. *Robinson*, 18 Ves. 429; 11 R. R. 226; *Graves* v. *Dolphin*, 1 Sim. 66; 27 R. R. 166; *Younghusband* v. *Gisborne*, 1 Col. 400; 66 R. R. 120.

Income to cease on alienation.

The mere ownership of income, however, though it cannot (except in one instance presently noticed, p. 242) be the subject of an inalienable trust, may be made to cease on alienation, bankruptcy, or other such event, see *Martin* v. *Margham*, 14 Sim. 230; 65 R. R. 571; *Rochford* v. *Hackman*, 9 Ha. 475; 21 L. J. Ch. 511; 89 R. R. 538; *Re Dickson's Trusts*, 1 Sim. N. S. 37; 20 L. J. Ch. 33; 89 R. R. 16; *Jones* v. *Wyse*, 2 Ke. 285; 7 L. J. Ch. 107; *Montefiore* v. *Enthoven*, L. R. 5 Eq. 35; 37 L. J. Ch. 43; 17 L. T. 114; *Hurst* v. *Hurst*, 21 Ch. D. 278; 51 L. J. Ch. 729; 46 L. T. 899; *In re Bedson's Trusts*, 28 Ch. D. 523; 54 L. J. Ch. 644; 52 L. T. 554; and it is in every day's practice to subject life

interests, both in real and personal property, to determining provisoes of this nature.

**Notes to Prec. 11.**

To what extent alienation may be restrained.

But an estate of inheritance in lands, or the entire interest in personalty, cannot be made liable to divestment even on alienation or bankruptcy, *Ware* v. *Cann*, 10 B. & C. 433; 34 R. R. 469; *Bradley* v. *Peixoto*, 3 Ves. 324; 4 R. R. 7; *Ross* v. *Ross*, 1 Jac. & W. 154; 20 R. R. 263; *Holmes* v. *Godson*, 8 D. M. & G. 152; 25 L. J. Ch. 317; *Whitfield* v. *Prickett*, 2 Ke. 608; 7 L. J. Ch. 187; *Re Machu*, 21 Ch. D. 838; 47 L. T. 577; *In re Dugdale*, 38 Ch. D. 176; for the power of alienation is incidental to an estate in fee or a complete ownership of personalty, and any attempted general restraint on the exercise of this incident to ownership is repugnant to the estate, and therefore void; see the notes to *Bradley* v. *Peixoto* in Tud. L. C. R. P. In cases of this nature, the only mode of effectuating the design, often anxiously entertained by donors, of securing the *corpus* of the property against the acts of the donee himself and the claims of his creditors, is to invest a third person with a discretionary power either to give or to withhold it, as he may think proper; in short, absolutely to defer all proprietary title in the intended object of bounty until its actual application to his use by the testator's nominee, and ultimately to give to another (for this seems to be essential to the consistency and effectiveness of the scheme) what remains so unapplied at his decease. Nor is this all, for, according to the doctrine of *Piercy* v. *Roberts*, 1 M. & K. 4; 36 R. R. 239, in order to exclude the claim of the trustees in bankruptcy, the power should be made incapable of being exercised in favour of the bankrupt (supposing him to be the sole object of the power) after such event, or, in other words, the property should, on bankruptcy, be absolutely given over to another in like manner as at death; otherwise it is considered as an unlawful attempt to continue the property in the bankrupt after the law has taken away his capacity to retain it, and consequently what remains unapplied belongs to the trustees. See also *Kearsley* v. *Woodcock*, 3 Ha. 185; 64 R. R. 255; *Wallace* v. *Anderson*, 16 Be. 533; *Sharp* v. *Cosserat*, 20 Be. 470; *Carr* v. *Living*, 28 Be. 644. Of course, there in no objection to the power, in the event of bankruptcy, being made exercisable in favour of the wife or children of the bankrupt.

Discretionary power of trustees, how affected by bankruptcy of object.

The doctrine which prohibits the imposition of any general restraint on the alienation of the inheritance of lands and the absolute property in personalty has been held not to prevent the aliening power from being confined in its exercise to certain objects; as in the case of a gift to A. in fee, upon condition that, in a certain event, he shall have no power to dispose of the property, unless to his sisters and their children; this was held to be valid, *Doe* v. *Pearson*, 6 Ea. 173; 8 R. R. 447; as to which see *Attwater* v. *Attwater*, 18 Be. 330; 23 L. J. Ch. 692; 104 R. R. 458; and *Re Macleay*, L. R. 20 Eq. 186; 44 L. J. Ch. 441; 32 L. T. 682. A restraint extending to particular modes of conveyance is not admissible, and a devisee in fee must be left at liberty to dispose of the property by any and every species of assurance which is

As to a power to alien in favour of defined objects.

**Notes to Prec. 11.**

adapted to the nature of his estate, *Ware* v. *Cann*, 10 B. & C. 433; 34 R. R. 469.

Alienation by a married woman may be restrained.

The single exception to the general doctrine respecting restraints on alienation is that in favour of married women who may be prevented from disposing of annual income given for their separate use (to which the power of alienation is otherwise incident) by mere words of restriction without any clause of forfeiture, *Miss Watson's Case*, cited 11 Ves. 221. *Baggett* v. *Meux*, 1 Ph. 627, decided that this applies not only to a life interest but to a separate interest given to a married woman absolutely. There it was held that though there is an absolute gift of a house to a married woman, if in a subsequent part of the will there is a clear indication that the devisee is only to receive the rents from time to time during her coverture and not by way of anticipation, there the devisee takes the house absolutely, but is precluded from charging the income by anticipation during coverture. The effect of the restraint on anticipation must in all cases depend on the intention of the testator as expressed in the will. It used to be thought by some that where there is a gift of an income-bearing fund the restraint on anticipation is effectual, but that it is not effectual if it is a gift of a sum of cash, but this is now overruled in favour of the intention of the testator as appearing on the will, and the question is, has he declared an intention that the money should be paid to her, or that the income should be paid to her from time to time, *In re Bown*, 27 Ch. D. 411; 53 L. J. Ch. 881; 50 L. T. 796. If he shows that she is intended to enjoy the gift not as a mere money fund, but as an annuity, as in *In re Ellis's Trusts*, L. R. 17 Eq. 409; 43 L. J. Ch. 444, that is a strong intimation of his intention that he means the restraint on anticipation to apply not only to the income but also to the capital, and it cannot be paid to her during coverture. In *In re Croughton's Trusts*, 8 Ch. D. 460; 47 L. J. Ch. 795, a direction that a married woman's receipts should be a good discharge was laid hold of so as to authorise payment of the fund to her, notwithstanding that there was a restraint on anticipation. In *In re Bown, ubi sup.*, Kay, J., found it impossible to reconcile the two parts of the judgment in *In re Sykes' Trusts*, 2 J. & H. 415; 6 L. T. 350, as the Court had held that the restraint on alienation in that case was binding so that the married woman could not make a valid charge upon the fund, and yet it ordered the fund to be paid out to her. However, Baggallay, L.J., in the Court of Appeal said he agreed with *In re Sykes' Trusts*.

But restraint on anticipation of rents does not prevent an equitable tenant in tail from barring the entail, with the concurrence of her husband, and devising the equitable fee simple, *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373; 38 L. T. 191.

Doctrine not applicable to unmarried women.

But a woman not under coverture is incapable of being the object of an inalienable trust, no less than a person of the male sex, she not being exposed to marital influence, the exclusion of which has been the ground for placing in the hands of testators and settlors, in this solitary

**Notes to Prec. 11.**

instance, the power of creating such a trust, by way of compensation, it would seem, for those disabilities which the law annexed to a state of coverture, *Woodmeston* v. *Walker*, 2 R. & M. 197; 34 R. R. 56; see also *Barton* v. *Briscoe*, Jac. 603; *Jones* v. *Salter*, 2 R. & M. 208; 34 R. R. 60; *Brown* v. *Pocock*, 2 R. & M. 210; 38 R. R. 107. The cited cases show that the circumstance of the *cestui que trust* being under coverture when the will takes effect is no further material than that it renders the restriction immediately operative; for discoverture, come when it may, *i.e.* whether it exists at, or occurs subsequently to, the creation of the interest in question, necessarily brings with it exemption from the clog. See *Wright* v. *Wright*, 2 J. & H. 647. By parity of reasoning, in the converse case, namely, where the *cestui que trust* is discovert at the death of the testator, and afterwards marries, the futurity of the latter event cannot detract from the force of the restriction, which will be exactly co-extensive with the coverture whenever contracted; and if the *cestui que trust* does not avail herself of the privilege of alienation resulting from her temporary discoverture, the restriction will adhere to her during any subsequent coverture, as firmly as if she had been married at the testator's decease. See the elaborate judgments of Lord Langdale and Lord Cottenham in *Tullett* v. *Armstrong*, 1 Ke. 428; 1 Be. 1; 4 M. & C. 377; and 1 Hayes. Conv. 499.

Separate use, future coverture.

*Tullett* v. *Armstrong.*

Where the trust was to pay the rents, &c., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint; and in default of such appointment, or so far as the same should not extend, into her proper hands, for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges; and, after her death, in trust for her children; Sir L. Shadwell, V.-C. E., held in *Brown* v. *Bamford*, 11 Sim. 127; 65 R. R. 467, that, as the restriction on anticipation was not repeated in the trust for the separate use of the *cestui que trust*, she took a life interest under that trust, exempt from any restraint on her aliening power; but this decision was reversed by Lord Lyndhurst, 1 Ph. 620; 15 L. J. Ch. 361. And the principle of his lordship's construction has been followed in subsequent cases, *Harrop* v. *Howard*, 3 Ha. 624; 14 L. J. Ch. 182; *Harnett* v. *MacDougall*, 8 Be. 187; 14 L. J. Ch. 173; *Field* v. *Evans*, 15 Sm. 375; *Baker* v. *Bradley*, 7 D. M. & G. 597; 25 L. J. Ch. 7; *Re Ross's Trusts*, 1 Sim. N. S. 196; 20 L. J. Ch. 293.

*Brown* v. *Bamford.*

A married woman restrained from anticipation cannot assign an apportioned part of current interest up to the date of the assignment, *Re Brettle*, 2 D. J. & S. 79.

When once the restraint on anticipation was imposed, and by reason of coverture had become effectual, it was only by the determination of the coverture that the restraint could, until recently, be removed. Thus, where a testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation,

Restraint on anticipation can be dispensed with by the Court.

**Notes to Prec. 11.**

it was held that the Court had no power to interfere for the purpose of enabling the married woman to comply with the condition, *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; 21 Be. 214; 25 L. J. Ch. 385; 106 R. R. 192. And where a fund had been settled by order of the Court to the separate use of a married woman without power of anticipation, the Court would not disturb it, *Chapman* v. *Lamport*, 8 W. R. 466. But by sect. 39 of the Conveyancing Act, 1881, the Court is now empowered to bind a married woman's interest in any property, notwithstanding a restraint on anticipation, by order made with her consent and on proof that it is for her benefit: see *Hodges* v. *Hodges*, 20 Ch. D. 749; 51 L. J. Ch. 549; 46 L. T. 366, and cases collected in "A Manual of the Law relating to Married Women," by the present editor, at pp. 112–115. And by sect. 61 of the Settled Land Act, 1882, it is enacted that a restraint on anticipation shall not prevent the exercise by a married woman of any of the powers conferred by that Act. And by sect. 19 of the Married Women's Property Act, 1882, it is provided that no restriction against anticipation contained in a settlement of a woman's own property shall have any validity against debts contracted by her before marriage.

Conveyancing Act, 1881, s. 39.

Settled Land Act, 1882, s. 61.

Trustee Act, 1893.

By sect. 45 of the Trustee Act, 1893, where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing of, a beneficiary, the Court may, notwithstanding that the beneficiary is a married woman entitled for her separate use with a restraint upon anticipation, impound all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee.

In *Fleming* v. *Armstrong*, 34 Be. 109; 11 L. T. 470, a suit for partition of real estate, one share of which was settled to the separate use of a married woman without power of anticipation, the Court declared the costs of the suit of herself and husband to be a charge on her share, and ordered them to be raised by a sale. And see *Wilton* v. *Hill*, 25 L. J. Ch. 156, as to compromise of suit, where one of the parties was a married woman restrained from anticipation.

Married Women's Property Act, 1893, s. 2.

By sect. 2 of the Married Women's Property Act, 1893, "In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property or otherwise as may be just."

See also on the doctrine of the wife's separate estate the notes to *Hulme* v. *Tenant*, 1 Br. C. 16, in 1 Wh. & Tud. L. C. Eq.; and a "Manual of the Law relating to Married Women," by the present editor, published by Messrs. Sweet and Maxwell, Limited.

Possibility of issue down to death.

(*s*) Though the legal possibility of issue continues down to the last moment of life, without distinction of sex, *Jee* v. *Audley*, 1 Cox, 324;

**Notes to Prec. 11.**

1 R. R. 46; and see *Re Sayer's Trusts*, L. R. 6 Eq. 319; 36 L. J. Ch. 350; 16 L. T. 203; yet Courts of Equity will liberate a fund, when, from the advanced age of a female, the probability of the birth of children is at an end, *Leng* v. *Hodges*, Jac. 585; *Fraser* v. *Fraser*, *ib.* 586, n.; *Lyddon* v. *Ellison*, 19 Be. 565; 105 R. R. 245; *Edwards* v. *Tuck*, 23 Be. 268. In *Fraser* v. *Fraser*, and *Lyddon* v. *Ellison*, the respective ages of the ladies (both unmarried) in question were 55 and 56; and in *Re Widdow's Trusts*, L. R. 11 Eq. 408; 40 L. J. Ch. 380; 24 L. T. 87, the presumption against child-bearing was acted on in the case of a widow aged 55 and of a spinster aged 53. The Court will liberate the fund without, as formerly, requiring the applicants to give security to refund if necessary, and sometimes even without requiring them to enter into recognisances so to do; the order for payment has been made on the mere undertaking of the parties to account for the fund, *Brown* v. *Pringle*, 4 Ha. 124; 14 L. J. Ch. 121; and see *Miles* v. *Knight*, 12 Jur. 666; 17 L. J. Ch. 458; *Dodd* v. *Wake*, 5 De G. & S. 226; 42 R. R. 245. But in both the before-cited cases of *Fraser* v. *Fraser* and *Lyddon* v. *Ellison*, *ubi sup.*, the personal recognisances of the parties were required. The Court will not treat as past child-bearing a woman under 50, although positive medical evidence that she is past child-bearing be adduced, *Groves* v. *Groves*, 12 W. R. 45; but in *Re Millner's Estate*, L. R. 14 Eq. 245; 42 L. J. Ch. 44; 26 L. T. 825, it was presumed that a woman aged 49 years and nine months who had been married for 26 years and never had a child would not have any by her then husband. In *Croxton* v. *May*, 9 Ch. D. 388; 39 L. T. 461, the lady was 54 years and six months old, but having been married only three years, the Court refused to pay out the fund.

Equitable relief, in case of woman of advanced age.

As to the uncertainty of the age at which the power of child-bearing ceases, see Taylor, Med. Jurisp. ch. 55; and see Dart, V. & P., where the author states on respectable medical authority that the peculiar effect of the Australian climate on the English constitution is often to induce pregnancy in female emigrants who have passed the usual period of child-bearing in England.

(*t*) The rules for ascertaining the objects of gifts to children as a class, so far as relates to the period of their coming into existence, are as follows: *First*, If no period of distribution is named, the class is ascertained at the death of the testator; and a gift which takes effect in possession immediately on the testator's decease in favour of the "children" of A., whether A. be living or dead, extends to children in existence at the death of the testator, if there are any such, and those only, *Hill* v. *Chapman*, 3 Br. C. 391; *Viner* v. *Francis*, 2 Cox, 190; 2 R. R. 29. *Secondly*, When a period of distribution is named, *that* is the time for ascertaining the class, *Hagger* v. *Payne*, 23 Be. 474; 26 L. J. Ch. 617. *Thirdly*, A gift to children, the distribution of whose shares is postponed until majority or some other age (which none of the class at the testator's decease has attained), embraces the children living at the testator's decease, and also those who come *in esse* before the

Gift to children, as a class;

—as to the period of the children coming into existence.

**Notes to Prec. 11.**

eldest attains the prescribed age, when the distribution *pro tanto* (*i.e.* to such eldest child) takes place, and children born after that time are excluded, *Andrews* v. *Partington*, 3 Br. C. 401; *Gilbert* v. *Boorman*, 11 Ves. 238; 8 R. R. 137; *Gillman* v. *Daunt*, 3 K. & J. 48; *Gimblett* v. *Purton*, L. R. 12 Eq. 427; 40 L. J. Ch. 556; as to a child *en ventre*, see *Garratt* v. *Weeks*, L. R. 20 Eq. 647; 45 L. J. Ch. 193. But this rule applies only to the gift of an aggregate fund and not to a gift of income. In this case children coming into being after the eldest attains the prescribed age are let in to share in the periodical distribution of the income, *In re Wenmoth's Estate*, 37 Ch. D. 266; 57 L. J. Ch. 649; 57 L. T. 709. See also *In re Powell*, '98, 1 Ch. 227; 67 L. J. Ch. 148; 77 L. T. 649; and *In re Stephens*, '04, 1 Ch. 322; 73 L. J. Ch. 3; 91 L. T. 167.

Gifts to children, as a class.

*Fourthly*, A gift to children, preceded by a life interest, includes the children living at the death of the testator, and those who come *in esse* in the lifetime of the prior devisee or legatee, whose death is made the period of distribution, *Devisme* v. *Mello*, 1 Br. C. 537; *Leigh* v. *Leigh*, 17 Be. 605; 23 L. J. Ch. 287; 99 R. R. 308; *Odell* v. *Crone*, 3 Dow. 61; 15 R. R. 20; and such is the rule whenever the distribution is postponed to a future period, *Gardner* v. *James*, 6 Be. 170; 63 R. R. 44. *Fifthly*, Where no child is in existence at the testator's decease, the devise or bequest, though framed as a gift in possession, will extend to all the children who afterwards come *in esse*, *Weld* v. *Bradbury*, 2 Ver. 705; *Harris* v. *Lloyd*, T. & R. 310; 24 R. R. 68. And a gift which appears on the face of the will as a future disposition in favour of children, but is reduced, by events happening in the testator's lifetime, to a gift in possession, falls within this rule, *Haughton* v. *Harrison*, 2 Atk. 329. And there is some ground to contend that the same doctrine applies where the gift in favour of children is preceded by a life interest which determines before any child is born, *Chapman* v. *Blissett*, Ca. t. Talb. 145; *Hutcheson* v. *Jones*, 2 Mad. 124; 17 R. R. 198; *Horseman* v. *Abbey*, 1 J. & W. 381; 21 R. R. 188; but see *Bartleman* v. *Murchison*, 2 R. & M. 136. In *In re Bedson's Trusts*, 28 Ch. D. 523; 54 L. J. Ch. 644; 52 L. T. 554, the gift to children at twenty-one was preceded by a life estate, but there was a proviso that in case of the bankruptcy of the tenant for life the fund and income should thenceforth go and be payable to or for the benefit of the child or children of the tenant for life "in the same manner as if he was naturally dead." The tenant for life having become bankrupt, it was held that the children who attained twenty-one would take whether born before or after the bankruptcy.

Where there is a gift to children at twenty-one, the general rule is that the class is fixed when the eldest child attains twenty-one, and no child born after can take. But if maintenance or advancement is continued beyond the time when the eldest child attains twenty-one—if, for instance, advancement is directed out of vested shares—all children will be let in, *In re Courtenay*, 74 L. J. Ch. 654.

As to letting in children

It will be perceived that the point as to the letting in of children born

**Notes to Prec. 11.**

after the determination of the preceding life interest can only arise where the tenant or legatee for life in some person other than the parent of the children; for, where the ulterior gift is to the children of such devisee or legatee for life, no child can come *in esse* after the determination of the prior interest (a child *en ventre* being considered as *in esse*); so that, if the interests of the children are made to vest immediately on the decease of the legatee for life, there can be no exclusion. See *In re Groom*, '97, 2 Ch. 407; 66 L. J. Ch. 778; 77 L. T. 154.

born after determination of prior life interest.

With respect to freeholds of inheritance, it was suggested in a former edition of this work that if the legal estate were devised to A. for life, and after his death to his children, who "either before *or after* his death" shall attain twenty-one, or to the children of B., born "either before *or after*" the death of A., children attaining majority or born after A.'s death would take by executory devise. This view derived support from *Doe* v. *Hopkinson*, 5 Q. B. 223; 13 L. J. Q. B. 85, and *Browne* v. *Browne*, 3 S. & G. 568; 26 L. J. Ch. 635; and although it did not prevail in *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; still, in *Re Lechmere and Lloyd*, 18 Ch. D. 524; 45 L. T. 551, effect was given to the words "or after," and it was held that those who had attained twenty-one at the death took vested estates which were liable to open and let in those who afterwards attained twenty-one; and this case was followed in preference to *Brackenbury* v. *Gibbons*, in *Miles* v. *Jarvis*, 24 Ch. D. 633; 52 L. J. Ch. 796; *Dean* v. *Dean*, '91, 3 Ch. 150; 60 L. J. Ch. 553; 65 L. T. 65; *In re Wrightson*, '04, 2 Ch. 95; 73 L. J. Ch. 742; 90 L. T. 748, and *White* v. *Summers*, '08, 2 Ch. 256; 77 L. J. Ch. 506; 98 L. T. 845. The rule is, that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it is not construed as an executory devise; to constitute the ulterior limitation an executory devise, the precedent estate must *necessarily* be determinable before the ulterior devise takes effect; if it be merely *liable* to determine before the ulterior devise takes effect, the liability only renders the remainder contingent. In *Re Lechmere and Lloyd* it was held that the words "or after" prevented the gift from taking effect as a remainder, and thus renders it material to distinguish (and perhaps it may be thought a thin distinction) between a devise to A. for life and after his death to "the children of A. who either before or after his death shall attain twenty-one," and a devise to A. for life and after his death to "*all and every* the children of A. who shall attain twenty-one"; for the latter is a contingent remainder, *Festing* v. *Allen*, 12 M. & W. 279; 67 R. R. 339; *Rhodes* v. *Whitehead*, 2 Dr. & S. 532; 12 L. T. 601; *Holmes* v. *Prescott*, 3 N. R. 559; 33 L. J. Ch. 264; *Price* v. *Hall*, L. R. 5 Eq. 399; 37 L. J. Ch. 191; *Perceval* v. *Perceval*, L. R. 9 Eq. 386, and fails if no child has attained twenty-one at the death of A., or becomes vested in those children who have then attained twenty-one to the exclusion of those who afterwards attain that age, *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185. There are, however, two classes of cases, (1) where the devise is to a person at a given age, with a gift over

Freeholds of inheritance—executory devise, or contingent remainder.

**Notes to Prec. 11.**

if he dies under that age; where there is an absolute gift to some ascertained person, accompanied by words which though apparently importing a contingency do in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested is to be devested; of this class are *Edwards* v. *Hammond*, 3 Lev. 132; *Bromfield* v. *Crowder*, 1 B. & P. N. R. 313; 8 R. R. 805; *Doe* v. *Moore*, 14 Ea. 601; 13 R. R. 329; *Doe* v. *Nowell*, 1 M. & S. 327; 5 Dow. 202; 14 R. R. 445; *Muskett* v. *Eaton*, 1 Ch. D. 435; 45 L. J. Ch. 22; 33 L. T. 716; (2) where the given age is part of the description of the devisee, and there is no gift to any person who does not answer the whole of the description, see *Duffield* v. *Duffield*, 1 D. & Cl. 268; 32 R. R. 70; *Newman* v. *Newman*, 10 Sim. 51; 51 R. R. 206; *Bull* v. *Pritchard*, 5 Ha. 567; 16 L. J. Ch. 185; 71 R. R. 229; *Stead* v. *Platt*, 18 Be. 50; 104 R. R. 364. See also *In re Francis*, '05, 2 Ch. 295; 74 L. J. Ch. 487; 93 L. T. 132. In a devise to "the children of A. who shall attain twenty-one," the attaining twenty-one is as much part of the description as being a child of A., and if the attaining twenty-one constitutes part of the description of the objects, nothing vests in any child until twenty-one; and it would seem that the result is not varied by the presence of a maintenance clause, *Bull* v. *Pritchard* (*ubi supra*). The simple way to give effect to the intention is to devise the legal fee to trustees, giving the children of A. only an equitable estate, *Riley* v. *Garnett*, 3 De G. & S. 629; 19 L. J. Ch. 146; 84 R. R. 389; *Re Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. Ch. 316; 24 L. T. 223; *Cunliffe* v. *Brancker*, 3 Ch. D. 393; 46 L. J. Ch. 128; 35 L. T. 578; *Berry* v. *Berry*, 7 Ch. D. 657; 47 L. J. Ch. 182; 38 L. T. 474; *Abbiss* v. *Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348; 44 L. T. 267; or there may be interposed between the life estate of A. and the estate of his children a limitation to trustees for a term of twenty-one years from the death of A. if any child of A. shall so long be living and under twenty-one. In *Astley* v. *Micklethwait*, 15 Ch. D. 59; 49 L. J. Ch. 672; 43 L. T. 58, contingent remainders were preserved from failure by the fact of the legal estate being outstanding in a mortgagee. But as regards wills executed after the 2nd August, 1877, the question has been rendered comparatively unimportant by 40 & 41 Vict. c. 33, whereby it is enacted that every contingent remainder created by any instrument executed after that date which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

40 & 41 Vict. c. 33.

Effect of expressions to extend or restrict the class.

In construing words expressly restricting or enlarging the class of children who are the objects of the gift, there seems in general to be no extension of the range of objects by the introduction of the word "all," *Scott* v. *Harwood*, 5 Mad. 332; 21 R. R. 300. It is also clear that the words "hereafter to be begotten," added to a future gift to children

**Notes to Prec. 11.**

(*i.e.* a gift under which the possession or distribution is postponed to a period subsequent to the death of the testator), have no effect in extending the class to objects born after the period of distribution, *Paul* v. *Compton*, 8 Ves. 375; 7 R. R. 81; *Whitbread* v. *Lord St. John*, 10 Ves. 152; 7 R. R. 366; *Gilbert* v. *Boorman*, 11 Ves. 238; 8 R. R. 137. Nor, on the other hand, do these words exclude existing children, *Hebblethwaite* v. *Cartwright*, Ca. t. Talb. 30; *Almack* v. *Horn*, 1 H. & M. 630; 32 L. J. Ch. 304; 8 L. T. 415; though a bequest in a codicil to "each child that may be born" to A. was held to apply only to children born after the date of the codicil, *Early* v. *Middleton*, 14 Be. 453; *Townsend* v. *Early*, 28 Be. 429; 3 D. F. & J. 1. But if the gift be immediate, *i.e.* to take effect in possession on the death of the testator, such words as "to be born" or "to be begotten," annexed to a general devise or bequest to children, have the effect of extending it to all the children who shall ever come into existence, *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185; see also *Gooch* v. *Gooch*, 3 D. M. & G. 366; 22 L. J. Ch. 1089; 92 R. R. 223. But this construction does not apply to pecuniary legacies where the consequence of letting in children born after testator's death would be the postponement of the distribution of the testator's general estate until the death of the parent of the legatees, *Ringrose* v. *Bramham*, 2 Cox, 384; 2 R. R. 84; *Storrs* v. *Benbow*, 2 M. & K. 46; 39 R. R. 132; *Butler* v. *Lowe*, 10 Sim. 317; 51 R. R. 259; *Mann* v. *Thompson*, Kay, 638; 101 R. R. 785; *Rogers* v. *Mutch*, 10 Ch. D. 25; 48 L. J. Ch. 133; in such cases the words of futurity are held to refer to the interval between the date of the will and the death of the testator. See also *Dias* v. *Livera*, 5 App. Cas. 123; 49 L. J. P. C. 26; 42 L. T. 267.

Effect of events happening in testator's life.

It should seem that if the event, on the occurrence of which the persons constituting the class of children entitled are to be ascertained, happens in the lifetime of the testator, as in the case of a bequest to the children of A. who shall be living at the death of B., as tenants in common, and B. dies in the lifetime of the testator, the gift extends to the children of A., and those only, who are living at the death of B.; see *Allen* v. *Callow*, 3 Ves. 292; *Harvey* v. *Harvey*, 3 Jur. 949; but such a gift is still a gift to a class, *Lee* v. *Pain*, 4 Ha. 250; 67 R. R. 41, and if any child living at the death of B. afterwards dies in the testator's lifetime, the share of such child does not lapse, but the surviving children take the whole, *Leigh* v. *Leigh*, 17 Be. 605; 23 L. J. Ch. 287; 99 R. R. 308; *Cruse* v. *Howell*, 4 Drew. 215; *Dimond* v. *Bostock*, L. R. 10 Ch. 358.

If the gift be to the "children of A., to wit, B., C. and D.," it is considered to be made to the children, not as a class, but as individuals, *Bain* v. *Lescher*, 11 Sim. 397; 54 R. R. 408; and consequently the share of one who died in the testator's lifetime was held to be undisposed of. Also if from the terms of the will it appears that a bequest is made to persons, not as a class, but as individuals, and the share of one of them is revoked by a codicil, and the will is in other respects confirmed, the revoked share will fall into the residue. *Orford* v. *Orford*, '03, 1 Ir. R. 121. But if a testator, after bequeathing to children as a class, revokes

**Notes to Prec. 11.**

the bequest as to one of them, the entire subject of gift devolves to the rest, *Shaw* v. *M'Mahon*, 4 Dr. & War. 431; 65 R. R. 724. A gift to nephews and nieces, except A. and B., is a gift to a class, *Dimond* v. *Bostock, sup.*; and a gift to "all my grandchildren with the exception of one, viz.: ——," was held to be a gift to the class not affected by the incomplete exception, *Illingworth* v. *Cooke*, 9 Ha. 37; 20 L. J. Ch. 512; 89 R. R. 325. The question is one as to the form of the gift. If the form is that of a class gift, the legatees take as a class and not as individuals, *Re Stanhope's Trusts*, 27 Be. 201; *Re Jackson*, 25 Ch. D. 162; 53 L. J. Ch. 180; 50 L. T. 18; *Kingsbury* v. *Walter*, '01, A. C. 187; 70 L. J. Ch. 546; 84 L. T. 697; *In re Venn*, '04, 2 Ch. 52; 73 L. J. Ch. 507; 90 L. T. 502. But see *Capes* v. *Dalton*, 86 L. T. 129.

In ascertaining the persons to take under a gift to children as a class after a previous life estate, the Court adopts the rule of including as many objects of the gift as possible, consistently with the declared purpose of the testator, *Bouverie* v. *Bouverie*, 2 Ph. 349; 16 L. J. Ch. 411; 78 R. R. 111; *Jackson* v. *Dover*, 2 H. & M. 209; 10 L. T. 489. See also *In re Knowles*, 21 Ch. D. 806; 51 L. J. Ch. 851; 47 L. T. 168; *Kekewich* v. *Barker*, 88 L. T. 130.

As to the claims of a child *en ventre sa mère*.

It may be observed, that a child *en ventre sa mère* is regarded as a child *in esse*; and this construction obtains as well where the gift is to children generally, as where it is to children "living" at a prescribed period, *Clarke* v. *Blake*, 2 Ves. 672; or even to children "born" at such period, *Rawlins* v. *Rawlins*, 2 Cox, 425; *Whitelock* v. *Heddon*, 1 B. & P. 243; *Trower* v. *Butts*, 1 S. & S. 181; 24 R. R. 164; the word being evidently used in a general popular sense, without the particular design of distinguishing between children born and children procreated. To fall within the class, the child *en ventre* must be legitimately procreated, as well as legitimately born, *Re Corlass*, 1 Ch. D. 460; 45 L. J. Ch. 118; 33 L. T. 630. And a child *en ventre* is treated as "living" or "born" only where such construction is necessary for the benefit of that child, *e.g.* when the words are used in the description of the objects of a bequest, or to prevent a gift to it from being devested, *Pearce* v. *Carrington*, L. R. 8 Ch. 969; 42 L. J. Ch. 900; 28 L. T. 659; not when used merely for the purpose of ascertaining a period of time, *Blasson* v. *Blasson*, 2 D. J. & S. 665; 34 L. J. Ch. 18; 11 L. T. 353. But see *In re Burrows*, '95, 2 Ch. 497; 65 L. J. Ch. 52; 73 L. T. 148; *In re Wilmer's Trusts*, '03, 2 Ch. 411; 72 L. J. Ch. 670; 89 L. T. 148; *Villar* v. *Gilbey*, '07, App. Cas. 139; 76 L. J. Ch. 339; 96 L. T. 511; *In re Salaman*, '08, 1 Ch. 4; 77 L. J. Ch. 60; 98 L. T. 255. In *In re Burrows* there was a devise to A. for life, and upon her death to B. "for her absolute use and benefit, in case she has issue living at the death of A., but in case she has not issue then living," then over. At the time of the death of A., who survived the testator, B. was *enceinte*, and the following day was delivered of a living child. *Held*, that B. took absolutely under the devise. Of course, a fourth child, *en ventre* at the date of the will, was not entitled under a gift to "each of the

three children of my niece," *In re Emery's Estate*, 3 Ch. D. 300; 34 L. T. 846.

If there is a gift "amongst all the children of A. B., and the said Y. Z.," the class is constituted of the children of A. B., together with Y. Z. personally, and not together with the children of Y. Z. For the latter interpretation, the gift should be "amongst all the children of A. B., and *of* the said Y. Z.," *Lugar* v. *Harman*, 1 Cox, 250; *Peacock* v. *Stockford*, 3 D. M. & G. 73; 98 R. R. 47; *Hawes* v. *Hawes*, 14 Ch. D. 614; 43 L. T. 280; *Re Featherstone's Trusts*, 22 Ch. D. 111; 52 L. J. Ch. 75; 47 L. T. 538. See also *In re Walbran*, '06, 1 Ch. 64; 75 L. J. Ch. 105; 93 L. T. 745.

See further, on gifts to children as a class, the notes to *Viner* v. *Francis*, 2 Cox, 190; 2 R. R. 29; in Tud. L. C. R. P., and 2 Jarm. Wills, Ch. XXX.

(*u*) See note (*d*), Prec. IX.

(*v*) As the Act of 36 Geo. 3, c. 52, has not subjected to legacy duty money which is to be appropriated in payment of the duty on legacies, a saving is effected by directing the duty to be paid out of the general estate. In the case of annuities, it is often advisable to relieve the legatee from the burthen, which, being payable out of his income (by four equal annual instalments), is much felt. This observation, however, is not applicable to annuities which are directed to be purchased; in which case the Act of 36 Geo. 3, c. 52, makes the duty attach on the price of the annuity as a pecuniary legacy. Suggestion as to legacy duty.

A gift of legacy duty on a specific or pecuniary legacy is a common pecuniary legacy, and, in the event of deficiency of the estate, abates along with other pecuniary legacies, *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800. And where a testator gave legacies free of duty *simpliciter*, and other legacies free of duty, with a direction that the duty should be paid out of his residuary estate; the legacies having been paid, the residue was insufficient to pay the duty; it was held that the gift of duty out of the residue failed *pro tanto*, and that the legatees, whose duty was to be borne by the residue, must themselves bear the duty to the extent to which the general personal estate was insufficient, *Wilson* v. *O'Leary*, L. R. 17 Eq. 419.

The following expressions exempt legatees from legacy duty. A direction to pay all legacies "without any deduction," *Barksdale* v. *Gilliat*, 1 Sw. 562; 18 R. R. 139; to pay annuities and legacies, "clear of property tax and all expenses whatsoever attending the same," *Courtoy* v. *Vincent*, T. & R. 433; 24 R. R. 94; "free from all expense," *Gosden* v. *Dotterill*, 1 M. & K. 56; 36 R. R. 244; "clear of all taxes and outgoings," *Louch* v. *Peters*, 1 M. & K. 489; 36 R. R. 357; "free from any charge or liability in respect thereof," *Warbrick* v. *Varley*, 30 Be. 241; and generally, a gift of a "clear" annuity of definite amount involves an exemption from duty, *Haynes* v. *Haynes*, 3 D. M. & G. 590; 98 R. R. 240; *Wilks* v. *Groom*, 4 W. R. 697; *In re Currie*, 57 L. J. Ch. 743; 59 L. T. 200; but a direction to invest sufficient Exemption from legacy duty.

**Notes to Prec. 11.**

stock to produce a clear yearly income does not, *Banks* v. *Braithwaite*, 32 L. J. Ch. 35; 7 L. T. 149; see, however, *Re Coles' Will*, L. R. 8 Eq. 271; 22 L. T. 221. A gift to testator's employés of six months' "full" salary is not a gift free from legacy duty, *In re Marcus*, 56 L. J. Ch. 830.

Succession duty.

As to the duty on the proceeds of real estate devised upon trust for sale, see *White* v. *Lake*, L. R. 6 Eq. 188. And see *Floyer* v. *Bankes*, 3 D. J. & S. 306; 33 L. J. Ch. 1; 9 L. T. 353, as to exemption from succession duty of a jointure rent-charge "without any deduction in respect of any taxes."

Estate duty.

As to what words will grant an exemption from estate duty, under the Finance Act, 1894, see *In re Parker-Jervis*, '98, 2 Ch. 643; 67 L. J. Ch. 682; 79 L. T. 403; *In re Lewis*, '00, 2 Ch. 176; 69 L. J. Ch. 406; 82 L. T. 291; *In re Leveridge*, '01, 2 Ch. 830; 71 L. J. Ch. 23; 85 L. T. 458; *In re Dyet*, 87 L. T. 744; *In re Pimm*, '04, 2 Ch. 345; 73 L. J. Ch. 627; 91 L. T. 190.

A direction in a will that the duty on legacies "herein" given shall be paid out of the testator's estate was held not to exempt legacies given by codicil, *Early* v. *Benbow*, 2 Col. 355; 70 R. R. 250; but see *Jauncey* v. *Attorney-General*, 3 Gif. 308; 5 L. T. 374; *Byne* v. *Currey*, 2 Cr. & M. 603; *In re Sealy*, 85 L. T. 451. See also *Chatteris* v. *Young*, 2 Rus. 183; 26 R. R. 44; *Cooper* v. *Day*, 3 Mer. 154; and note (*d*), Prec. IX.

Equitable property vests in the new trustees without conveyance.

(*x*) Interests equitable in their nature (as the benefit of a trust) are often formally transferred on the appointment of new trustees; but the appointment alone confers all the fiduciary dominion which can be acquired over such property. Powers of appointing new trustees should not direct the execution of deeds of assurance in such terms as might seem to make the act an essential concomitant of the exercise of the power, without regard to the nature of the property. Indeed the direction to vest the property in the new trustees is mere surplusage, and may always without impropriety be omitted. Where the only trust property consists of stock in the public funds, of course a deed of transfer is not requisite, as a fund is transferred by a mere alteration of names in the books at the Bank of England. Where the property is of such a nature as not to require a deed for transferring it, the donee may be empowered to appoint new trustees by a mere memorandum in writing; but as the appointment of a new trustee requires the same stamp duty, whether the appointment is effected by an instrument under hand only or by a deed, and there is therefore no saving in the matter of stamp duty, it is better to make the appointment by deed. A declaration by the appointer in the deed of appointment is now sufficient, without conveyance or assignment, to vest in the continuing and new trustees any legal or equitable estate or interest in land or chattels, or the right to recover anything in action (56 & 57 Vict. c. 53, s. 12); but this section does not extend to any legal estate in copyholds, or mortgaged estates, or to shares in companies or other property transferable only in books kept by a body or in manner prescribed by or under Act of Parliament.

Trustee Act, 1893, s. 12.

## No. XII.

WILL *of a* MARRIED MAN, *providing for a Wife and his Son, an only Child* (*a*).—*Bequest of Household Effects to Wife.—Pecuniary Legacy to Testator's Mother for Life, then to his Sister absolutely.—Devise of Real Estates to Wife for Life.—Remainder to Son absolutely, with an Executory Devise, on his Death under Age, to Wife absolutely.—Bequest of Residuary Personal Estate to Trustees for Conversion and Investment.—Income to Wife for Life.—Capital to Son, with Executory Bequest on his Death under Age to Wife.—Provision for Advancement of Son.—Power to sell Real Estate and invest the Produce, to be held upon the Trusts of the Personal Estate; to postpone the Conversion of Personal Estate; to appoint trustees.—Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I BEQUEATH to my trustees and executors hereinafter named £—— apiece and to my friends [*names &c.*] £—— apiece for a ring in remembrance of me AND I BEQUEATH to my said trustees the sum of £—— UPON TRUST to invest the same (*b*) and to pay the annual income thereof to my mother [*name*] during her life and after her death to transfer the principal fund to my sister [*name*] for her absolute use I DECLARE that my trustees shall not have power during my mother's life to exercise the power to vary investments conferred by statute without her consent in writing AND I DIRECT the aforesaid legacies to be retained or paid at the end of three calendar months after my death and the lastly bequeathed legacy to carry interest at the rate of four per cent. per annum from my death (*c*) I BEQUEATH all the furniture plate linen china glass books prints pictures wines liquors fuel consumable provisions

Legacies to executors and to friends for rings.

Legacies to trustees, in trust for testator's mother for life, then for his sister absolutely.

Restriction upon power to vary the investment.

Household goods, &c., to wife absolutely.

**Prec. 12.**

and other household effects of which I shall die possessed unto my wife [*name*] absolutely (*d*) I DEVISE all the real estate of whatsoever tenure and wheresoever situate (including chattels real) to which I shall at my death be entitled either in possession reversion or otherwise unto my wife [*name*] for her life without impeachment of waste and after her death unto my son and only child [*name*] his heirs executors administrators and assigns but if my said son shall die whether in my lifetime or after my decease under the age of twenty-one years (*e*) without leaving issue then I devise the same real estate and chattels real unto my wife her heirs executors administrators and assigns I BEQUEATH the residue of my personal estate to my trustees hereinafter named UPON TRUST to convert and get in the same and invest the moneys to arise therefrom AND UPON FURTHER TRUST to permit and empower my wife to receive the annual income of the said moneys or the securities whereon the same shall be invested during her life And after her death as to the same moneys and securities and the annual income thenceforth to become due for the same IN TRUST for my said son his executors administrators and assigns. But if my said son shall die whether in my lifetime or after my decease under the age of twenty-one years without leaving issue then IN TRUST for my wife her executors administrators and assigns I DIRECT my said trustees or trustee to accumulate during the minority of my said son any income of the real and personal property hereinbefore devised and bequeathed to or in trust for him not applied by them in or towards the maintenance and education or otherwise for his benefit during his minority by investing the same and to add the accumulations thereof to the capital of the personal property so bequeathed I FURTHER EMPOWER my said trustees or trustee with the consent in writing of my wife during her life and after her death and during the minority of my said son in the discretion of my said trustees or trustee to apply any part or parts of the personal property so bequeathed as last aforesaid or of the said accumulations not exceeding in the whole the sum of £—— in or towards the advancement or preferment in the world of my said son I FURTHER

Real estate to wife for life, remainder to testator's son absolutely, but in the event of his death under age, to wife absolutely.

Residue of personal estate to trustees upon trust to get in and invest, &c.;

—to permit wife to receive the income for her life;

—capital to testator's son, but, in the event of his death under age, to wife.

Accumulation.

Advancement to son.

**Prec. 12.**

EMPOWER my said trustees or trustee if they or he shall think it advantageous so to do at any time or times with the consent in writing of my wife and after her death and during the minority of my said son in the discretion of my said trustees or trustee to sell my said real estate or any part or parts thereof AND I DIRECT my said trustees or trustee to invest the moneys to arise from the sale thereof and to hold the funds or securities whereon such investment shall be made upon the trusts hereinbefore contained concerning the funds or securities whereon the produce of my residuary personal estate may be invested I DECLARE that my said trustees or trustee shall have a discretionary power to postpone for such period as to them or him shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my death consist of shares in public companies or of stocks funds or securities of any description whatsoever but the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys and funds and securities aforesaid and the yearly proceeds thereof shall be deemed annual income for the purposes of such trusts I DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my wife during her life and after her death in the manner prescribed by law (*f*) I APPOINT my friends [*names and descriptions*] to be trustees of my will and I appoint my wife [*name*] and the said [*trustees*] to be executors of my will and guardians (*g*) of my said son [*name*] during his minority LASTLY I REVOKE all other wills IN WITNESS &c.

Power to trustees to sell real estate, and invest produce, to be held upon the trusts before declared of the residuary personal estate.

Power to postpone the getting in of personal estate—the yearly proceeds to be deemed annual income.

Power to appoint trustees.

Appointment of trustees, executors and guardians.

**NOTES to Precedent XII.**

(*a*) This Precedent should be adopted only in a case where the testator's wife has passed the age of child-bearing.

(*b*) See note (*b*), Prec. IV.

(*c*) If a legacy, whether pecuniary or of stock, is not paid at the expiration of a year from the testator's decease, or at such other period as the testator may have fixed for its payment, the legatee is entitled to interest at the rate of four per cent. from the end of the year, or such other period respectively, and not before. Thus the first payment of interest does not become due until two years after the death; and there is no difference in the case of a legacy to the testator's wife, *Stent* v.

As to legacies carrying interest.

**Notes to Prec. 12.**

*Robinson*, 12 Ves. 461; *In re Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802. This rule applies to similar legacies under the will of a married woman in exercise of a power of appointment, *Tatham* v. *Drummond*, 2 H. & M. 262. And if a testator directs his executors to purchase for A. 500*l.* Three per Cent. Consols, A. is not entitled to call for a transfer until the expiration of a year after the testator's decease, and, therefore, cannot claim the dividends for the interval, *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; 9 R. R. 1. But if the legacy were specific, as where a testator bequeaths a given portion of stock then standing in his name, the legatee would be entitled to the actual produce of the fund from the testator's decease, just as he would be entitled to the rents of a house specially devised; and see *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; 32 L. J. Ch. 151. Where legacies were directed to be paid within four years after testator's decease, interest was payable, as from the expiration of one year after testator's death, on such as remained unpaid after the year, *Olive* v. *Westerman*, 34 Ch. D. 70; 56 L. J. Ch. 75; 55 L. T. 83; distinguishing *Thomas* v. *Att.-Gen.*, 2 Y. & C. Ex. 525; 47 R. R. 453. A legacy to the testator's wife, in lieu of dower and freebench, carries interest only from the expiration of a year from the testator's death, *In re Bignold*, 45 Ch. D. 496; 59 L. J. Ch. 737; 63 L. T. 542. It is observable, too, that the rule which entitles a pecuniary legatee to interest only from the end of a year, applies as well to legacies which are to be invested for the benefit of a legatee for life as to those which are bequeathed to the legatee absolutely. "If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy, and till the legacy is payable, there is no fund to produce interest": *per* Lord Eldon, in *Gibson* v. *Bott*, 7 Ves. 96; 6 R. R. 90. But it is doubtful whether, if a sum of money is directed to be invested to produce an annuity, that it is to be considered as a legacy payable at the end of the year, or as an annuity payable from the death, *Gibson* v. *Bott*, 7 Ves. 97; 6 R. R. 90. If it is regarded as a legacy, the trustees of the fund, of course, cannot demand payment before the end of a year; the investment then takes place, and (supposing the interest payable half-yearly) the legatee for life receives nothing until the lapse of eighteen months from the testator's death. Such postponement of enjoyment by the legatee for life would seldom be consistent with the intention of the testator, and ought to be prevented, by expressly making the legacy carry interest from the testator's decease; but a declaration to this effect is, of course, less requisite where all the legacies are to be paid at an early period after the testator's decease; from which period, according to the doctrine already stated, the interest would begin to run. A consequence of the doctrine that a legacy carries interest from the arrival of the time of payment, and not before, obviously is, that interest does not run on contingent legacies, as the contingency necessarily postpones the payment, *Descrambes* v. *Tomkins*, 1 Cox, 133; *Tyrrell* v. *Tyrrell*, 1 Ves. 1; *Re*

Contingent legacy.

**Notes to Prec. 12.**

*Inman*, '93, 3 Ch. 518; 62 L. J. Ch. 940; 69 L. T. 374; so also where legacies are payable out of a reversionary interest in a particular fund, interest is payable on the legacies only from the time of the falling in of the reversion, *Earle* v. *Bellingham*, 24 Be. 448; 27 L. J. Ch. 545. A different doctrine from that above mentioned of Lord Eldon prevails with respect to a bequest of the residue of personalty for life with remainder over; contrary decisions will be found in the reports, but the preponderance of the latter cases was in favour of the claim of the residuary legatee for life to receive the income, in some shape or other, from the death of the testator; and the question was at length set at rest by a decision of the House of Lords, that the life tenant of the residue takes the whole income thereof during the first year after the testator's death, *Macpherson* v. *Macpherson*, 1 Macq. 243; 16 Jur. 847; 93 R. R. 865; see also *Johnston* v. *Moore*, 27 L. J. Ch. 453.

Interest on legacies.

Gift of residue for life, with gift over.

Where a sum of money is payable primarily out of rents or by mortgage of land, which is not subjected to the testator's debts, so that the payment is not involved in or dependent upon the general administration of the personal estate, the legacy carries interest from the death of the testator, *Spurway* v. *Glynn*, 9 Ves. 483; 7 R. R. 279; *Shirt* v. *Westby*, 16 Ves. 393; 10 R. R. 210; *Davies* v. *Davies*, Dan. 84; see also *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; 9 R. R. 1; *Earl of Miltown* v. *Trench*, 4 C. & F. 276. But where land is devised upon trust for sale, and out of the proceeds of sale to pay legacies, interest is payable only from the expiration of a year from the death, *Turner* v. *Buck*, L. R. 18 Eq. 301; 43 L. J. Ch. 583. This case was characterised by Kay, J., as "a unique decision," in the course of his judgment in *In re Waters*, 42 Ch. D. 517; 58 L. J. Ch. 750; 61 L. T. 431. In this case there was a device of real estate for life, followed by a direction that after the death of the life tenant the trustees should sell the real estate within three years of such death and retain out of the proceeds two sums of 1,000*l.* each, and a further declaration that the 1,000*l.*, with interest at four per cent. to the date of retainer, should be held upon trusts declared of testator's residuary estate. It was held that the interest on the legacies of 1,000*l.* ran from the death of the tenant for life.

Legacy payable out of land.

The old doctrine which made the title to interest depend on the fact whether the fund out of which the legacy is payable does or does not yield immediate profit seems to be exploded, see *Gibson* v. *Bott*, 7 Ves. 89, 97; 6 R. R. 87, 90. And where the residuary personal estate of a testator comprised a bond debt, and, the debtor being insolvent, part only of the principal and interest was recovered many years subsequently to the testator's death, it was held that the tenant for life of the residue, as against those in remainder, was entitled not to the sum which had actually been recovered in respect of interest, but only to the interest at four per cent. on the sum which the bond would have realised if the testator's estate had been administered at the end of a year after the debtor's death, *Turner* v. *Newport*, 2 Ph. 14. Where a legacy is given in satisfaction of a debt, interest is payable from the testator's death,

**Notes to Prec. 12.**

*Clark* v. *Sewell*, 3 Atk. 99. As to the interest payable where a testator directs the payment of the debts of another person previously deceased, see *Askew* v. *Thompson*, 4 K. & J. 620. And, if a legacy is directed to be paid at a future time, as to A. on the death of testator's wife, and she dies in his lifetime, *Pickwick* v. *Gibbes*, 1 Be. 271; 49 R. R. 363; or to A. on attaining twenty-one, or to B. on attaining that age or marriage, and A. attains twenty-one or B. marries in the testator's lifetime, the legacy will be payable at his decease, and the legatee will be entitled to interest from that period, *Coventry* v. *Higgins*, 14 Sim. 30; 65 R. R. 536.

Interest on legacy in satisfaction of a debt.

In *Noel* v. *Jones*, 16 Sim. 309; 17 L. J. Ch. 470; 80 R. R. 78, a bequest to trustees upon trust to pay and apply 800*l.* in and upon the education of the godson of the testatrix was held to be an absolute gift to the godson, bearing interest from the expiration of one year from the death of the testatrix.

Interest on legacies to children.

Legacies to infants to whom the testator stands *in loco parentis* are the subject of a peculiar doctrine respecting interest, arising from the moral claim which such objects are considered as possessing to an immediate provision. Such legacies, therefore, if the legatees are not otherwise provided for, will often carry interest before the prescribed time of payment, and even while contingent. Thus, if a testator bequeaths a pecuniary legacy, or the residue of his estate, to his children on their attaining majority, or to such children as shall attain majority, the children, though under twenty-one, will (subject to the qualification presently noticed) be entitled to the interest for maintenance from the day of the testator's decease, *Harvey* v. *Harvey*, 2 P. W. 21; *Conway* v. *Longville*, 1 Eq. Ca. Ab. 301; *Heath* v. *Perry*, 3 Atk. 102; *Incledon* v. *Northcote*, 3 Atk. 438; 2 Rop. Leg. 1245; or, in case of a posthumous child, from the birth, *Rawlins* v. *Rawlins*, 2 Cox, 425. As to the effect of express direction to accumulate the income arising from the residue of the testator's estate upon the right of the infant legatee to claim maintenance out of the interest, see *Mole* v. *Mole*, 1 Dick. 310; *Kime* v. *Welfitt*, 3 Sim. 533; 30 R. R. 211. And even where the testator expressly provides for maintenance during part of the minority, this does not prevent the allowance of interest for the remaining period, *Chambers* v. *Goldwin*, 11 Ves. 1; 7 R. R. 181; *Martin* v. *Martin*, L. R. 1 Eq. 369; 35 L. J. Ch. 281; 14 L. T. 129. A legacy by a parent to an infant carries interest from the death of the testator notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children, *Re Moody*, '95, 1 Ch. 101; 64 L. J. Ch. 174; 72 L. T. 190. The greatest stretch, however, of the doctrine in favour of provisions for maintenance is exemplified by those cases in which an express allowance made by the testator has been increased, *Aynsworth* v. *Pratchett*, 13 Ves. 321; *Stretch* v. *Watkins*, 1 Mad. 253; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Allen* v. *Coster*, 1 Be. 202; 49 R. R. 346; but in order to warrant such an augmentation, the

inadequacy of the testator's allowance must be clearly made out, *Hearle* v. *Greenbank*, 3 Atk. 716; *Long* v. *Long*, 3 Ves. 286, n.; and the general rule undoubtedly is, that where the testator has otherwise provided for the maintenance of his infant children, the claim to interest before the period appointed for payment of the legacy cannot be supported, *Wynch* v. *Wynch*, 1 Cox, 433; *Donovan* v. *Needham*, 9 Be. 164; 15 L. J. Ch. 193; 73 R. R. 309. Where the gift has proceeded from the parent of the infant, or a person *in loco parentis*, and the subject-matter is a residuary personal estate, maintenance will be allowed to the members of a class, even when their interests are contingent, if the chances of each ultimately becoming entitled are equal, and no other person is interested, *Fairman* v. *Green*, 10 Ves. 45; *Ex parte Kebble*, 11 Ves. 604; 8 R. R. 250; *Turner* v. *Turner*, 4 Sim. 430; *Errat* v. *Barlow*, 14 Ves. 202; 9 R. R. 273; *Cannings* v. *Flower*, 7 Sim. 523; *Aynsworth* v. *Pratchett*, 13 Ves. 321. See also *Re Colgan*, 19 Ch. D. 305; 46 L. T. 152. But where the infant's interest in real estate, *Green* v. *Elkins*, 2 Atk. 473; *Bullock* v. *Stones*, 2 Ves. S. 521; or in a particular trust fund, *Leake* v. *Robinson*, 2 Mer. 384; 16 R. R. 168, is contingent, the intermediate income (until the happening of the contingency) will belong to the heir or residuary devisee, or to the next of kin or residuary legatee, as the case may be (see *ante*, note (*f*), Prec. V.); and such income cannot be applied for the infant's benefit unless the application is directed or sanctioned by the will, see *Re Richards*, L. R. 8 Eq. 119, and *In re Crane*, '08, 1 Ch. 379; 77 L. J. Ch. 212; 98 L. T. 314. The gift for the infant's benefit must proceed from its parent or from a person who has put himself in the place of its parent, for maintenance (as a rule) will be refused out of a contingent interest, or where the fund is limited over, if the gift proceeds from a stranger, or even from a grandfather to his grandchild, *Errington* v. *Chapman*, 12 Ves. 20; *Crickett* v. *Dolby*, 3 Ves. 10; but see *Greenwell* v. *Greenwell*, 5 Ves. 194; *Cavendish* v. *Mercer*, 5 R. R. 25; or where the infant is a natural child, if not recognised and adopted by its father, *Lowndes* v. *Lowndes*, 15 Ves. 301. See, however, 44 & 45 Vict. c. 41, s. 43 (*ante*, p. 180), as to maintenance of infants out of the interest on contingent legacies, unless a contrary intention is expressed in the will.

Interest on legacies to infants, for maintenance.

The doctrine which entitles children to interest by way of maintenance does not extend to adults, *Lowndes* v. *Lowndes*, 15 Ves. 301; see also *Raven* v. *Waite*, 1 Sw. 553, 558; *Wall* v. *Wall*, 15 Sim. 513; 74 R. R. 137; nor, in general, to an infant whose parent is living, as the testator, in regard to such an object, does not stand *in loco parentis*, *Lomax* v. *Lomax*, 11 Ves. 48; 8 R. R. 84; *Errington* v. *Chapman*, 12 Ves. 20; unless there is distinct evidence of an intention to assume the parental office in regard to providing for the infant, *Powys* v. *Mansfield*, 3 M. & C. 359; 45 R. R. 277; nor, it is presumed, would it apply where the infant is married. It has often been a question whether the title to maintenance, under an express provision, ceases on marriage, *Chambers* v. *Goldwin*, 11 Ves. 1; 7 R. R. 181; *Bowden* v. *Laing*, 14 Sim. 113;

Adult legatees.

**Notes to Prec. 12.**

65 R. R. 552; *Conolly* v. *Farrell*, 8 Be. 347; 68 R. R. 107; see also *Staniland* v. *Staniland*, 34 Be. 536; *Scott* v. *Key*, 35 Be. 291. As to the applicability of the general doctrine, discussed in this note, to illegitimate children, see *Beckford* v. *Tobin*, 1 Ves. S. 308; *Raven* v. *Waite*, 1 Sw. 553; *Newman* v. *Bateson*, 3 Sw. 689; 19 R. R. 286; *Dowling* v. *Tyrell*, 2 R. & M. 343; 34 R. R. 111; *Rogers* v. *Soutten*, 2 Ke. 598; 44 R. R. 289; *Hill* v. *Hill*, 3 V. & B. 183; 13 R. R. 175.

Illegitimate children.

See also, as to the time of payment of legacies and interest, the notes to *Ashburner* v. *Macguire*, in 2 Wh. & Tud. L. C. Eq.

(*d*) See note (*b*), Prec. XV.

(*e*) The day of a person's birth is included in computing his age for testamentary purposes; which, coupled with the fact that the law does not generally recognise fractions of a day (*fractionem diei non recipit lex*), leads to the singular result that a person may, according to legal computation, attain his majority nearly two days before he has actually completed twenty-one years. Thus, suppose A. to be born (however short a time) before midnight on the 5th November, 1833, that day is to be included; if he lived (however short a time) beyond midnight of the 3rd November, 1854, so as to have entered upon the 4th November, the latter day must also be counted, fractions not being recognised; and thus A. legally attained his majority, and could execute a valid will, at the first instant of the 4th November, 1854; although, computing the time *de momento in momentum*, nearly forty-eight hours would still be wanting to complete twenty-one years from the instant of his birth, see the *Anonymous Case*, cited by L. C. J. Holt, 1 Ld. Raym. 480.

Mode of computing age. Fractions of a day not generally recognised by the law.

A person attains "his twenty-fifth year" when he becomes twenty-four years old, *Grant* v. *Grant*, 4 Y. & C. Ex. 256. To recur to the former example, A. attained his twenty-fifth year, in legal computation, at the first instant of the 4th November, 1857.

If an act is required to be done within six calendar months after the death of testator, the computation is exclusive of the day of the death; so that if the death takes place on the 12th of January, the last day for performance of the act is the 12th of July, *Lester* v. *Garland*, 15 Ves. 248; 10 R. R. 68; *Gorst* v. *Lowndes*, 11 Sim. 434; 10 L. J. Ch. 161.

The law, however, does not, for all purposes, reject fractions of a day. Thus, several deeds executed on the same day take effect in the order of their delivery, and when they relate to the same subject-matter the Court will inquire which was executed first, *Gartside* v. *Silkstone, &c. Co.*, 21 Ch. D. 762; 51 L. J. Ch. 828; 47 L. T. 76; and an execution issued on the same day as, but after, an act of bankruptcy committed is over-reached by the prior act of bankruptcy, *Ex parte Dobree*, 8 Ves. 82; see also *Taylor* v. *Horde*, 1 Bur. 106; Yelv. 138; *Barker* v. *Goodair*, 11 Ves. 78; 8 R. R. 89; *Wydown's Case*, 14 Ves. 80, 554, n.; *Thomas* v. *Thomas*, 27 Be. 537; *Campbell* v. *Strangeways*, 3 C. P. D. 105; 47 L. J. M. C. 6; *Lawford* v. *Davies*, 4 P. D. 61; 47 L. J. P. 38; 39 L. T. 111, for other cases in which indivisibility of the day was not maintained.

Fractions of a day recognised in some cases.

(*f*) See note (*f*), Prec. VI.

**Notes to Prec. 12.**

(*g*) Previously to 4 & 5 Ph. & Mar. c. 8 (repealed by 9 Geo. 4, c. 31), a man had no power to appoint by his will guardians of his children. But the 2nd section of that Act, by construction, enabled a father to appoint, by his last will and testament, or otherwise, guardians for his female children under the age of sixteen. This power was extended by 12 Car. 2, c. 24 (14 & 15 Car. 2, c. 19, Ireland), the 8th section of which authorised a father, whether of age or not, to dispose, by deed or by his last will and testament, of the custody and tuition of any of his children under the age of twenty-one years and unmarried at the time of his death, during the time such child or children should remain under the age of twenty-one years, or for any less time; and the Act sanctions his giving authority to a surviving guardian to nominate a guardian in the place of one who has died, *In b. Parnell*, L. R. 2 P. & D. 379; 41 L. J. P. 35; 26 L. T. 744. The Wills Act expressly includes within its scope (*ante*, p. 1) "a disposition by will and testament or devise of the custody and tuition of any child" by virtue of the above statute, and deprives a father who is under twenty-one (sect. 7, *ante*, p. 8) of the power of appointing by will guardians of his children. His power of appointing by deed, however, still remains. The stat. 12 Car. 2, c. 24, does not extend to illegitimate children, *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; 25 L. T. 408, although the Court will usually appoint the person named by the reputed father to be the guardian of such children, *Ward* v. *St. Paul*, 2 Br. C. 583; *Peckham* v. *Peckham*, 2 Cox, 46; *Chatteris* v. *Young*, 1 J. & W. 106; 20 R. R. 242.

As to appointment of guardians. 4 & 5 P. & M. c. 8. 12 Car. 2, c. 24. 1 Vict. c. 26. Illegitimate.

The power of appointing guardians does not extend to infant children who are married at the father's death; yet, if then unmarried, the guardianship is not determined by the subsequent marriage of sons, *Earl of Shaftesbury's Case*, cited 3 Atk. 625; but it is by the subsequent marriage of daughters, *Mendes* v. *Mendes*, 1 Ves. S. 91; *Roach* v. *Garvan*, *ib.* 160.

Married children.

As to what words in a will are sufficient to appoint a guardian, see *Miller* v. *Harris*, 14 Sim. 540; 65 R. R. 641; and as to revocation of an appointment of guardians see *Ex parte Lord Ilchester*, 7 Ves. 348; 6 R. R. 138.

By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), on the death of the father of an infant, the mother becomes guardian, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. The mother of any infant may by deed or will appoint any person to be guardian of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they are to act jointly. She may also by deed or will provisionally nominate some fit person or persons to act as guardian or guardians after her death jointly with the father, and the Court, after her death, may confirm the appointment, if it be shown to its satisfaction that the father is for any reason unfitted to be sole guardian of his children. See *In Re G*—— (an infant), '92, 1 Ch. 292; 61 L. J. Ch. 490; 66 L. T. 336, a case of an

Guardianship of Infants Act, 1886.

**Notes to Prec. 12.**

appointment under this Act, although the mother had not purported to make the appointment of a guardian to act "jointly with the father," as she should have done.

Probate.

It is not necessary to prove a testamentary appointment of guardians in the Probate Court, but such an appointment is to be proved in the same manner as a deed, *Gilliatt* v. *Gilliatt*, 3 Phillim. 222; *Lady Chester's Case*, 1 Ven. 207; *Re Morton*, 3 Sw. & Tr. 422; 33 L. J. P. 87; 9 L. T. 809. Where several testamentary guardians are appointed, the right of guardianship will vest in the survivors or survivor, although the will contains no words declaring that it shall survive, *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 106; but *contrà*, if the guardians are appointed by the Court, *Bradshaw* v. *Bradshaw*, 1 Russ. 528; 25 R. R. 127; *Hall Jones*, 2 Sim. 41.

Office survives.

## No. XIII.

WILL *of a* MARRIED MAN, *providing for a Wife and Younger Children by Name; the Eldest Son having been provided for.—Rent-Charge to Wife, reducible on Marriage.—Residue (Real and Personal) to Younger Children, with Executory Limitations between them and the Eldest Son* (*a*).

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I APPOINT my friends [*names &c.*] to be trustees of my will and I appoint my wife [*name*] and the said [*trustees*] to be executors of my will and guardians of my children during their respective minorities I BEQUEATH to my wife all my household furniture (*b*) plate linen glass china books pictures prints wines liquors fuel housekeeping stores and provisions and other effects of a like nature and the sum of £—— to be paid to her out of the first moneys which shall come to the hands of my executors I BEQUEATH to my eldest son [*name*] (for whom I have already provided) the sum of £—— only to be paid to him at the end of —— calendar months next after my death I DEVISE to my wife a yearly rent-charge of £—— for her life if she shall so long continue my widow but if she shall marry again then a yearly rent-charge of £—— only for the remainder of her life the said yearly rent-charge of £—— or £—— (as the case may be) to be charged upon and issuing out of all the freehold hereditaments [*or* the freehold hereditaments situate in the county of ——] to which I shall be entitled at my death and to be payable half-yearly the first payment of the said yearly rent-charge of £—— to be made at the end of six calendar months from my death if my wife shall be then living and my widow and the first payment of the said yearly rent-charge of £—— to be made at the end of six calendar months from the second marriage of my wife (*c*) I

Appointment of trustees, executors and guardians.

Movables and a pecuniary legacy to wife.

Pecuniary legacy to eldest son.

Rent-charge to wife, reducible on marriage.

**Prec. 13.**

Real estate and residue of personal estate among younger children, with executory limitations between them and the eldest son.

DEVISE AND BEQUEATH all the real estate and the residue of the personal estate to which I shall be entitled at my death (but as to my freehold hereditaments so charged as aforesaid subject to such of the said rent-charges as shall for the time being be payable) unto my younger children [*names*] absolutely in equal shares But if any of them shall die in my lifetime under the age of twenty-one years without leaving issue living at my decease or shall survive me but die under the age of twenty-one years without leaving issue Then I DEVISE AND BEQUEATH the share or shares as well accruing as original of such of them as shall so die to my said eldest son and to the others or other of my said younger children absolutely in equal shares

Provisions for advancement of younger children.

AND I EMPOWER my said trustees during the minorities of such of my younger children as shall be under age at my decease to apply in or towards the advancement (*d*) in the world of such children respectively any part not exceeding one-half of the principal or value of their respective shares of my real and residuary personal estate and for that purpose to raise by mortgaging or charging my real estate or any part or parts thereof such sum or sums of money as my said trustees shall think fit I

Power to convert residue of personalty.

ALSO DIRECT my said trustees to convert and get in my residuary personal estate as and when they shall think fit and to invest the net proceeds thereof (*e*) until the same shall become distributable under the dispositions hereinbefore contained I

Trustees under Conveyancing and Settled Land Acts.

APPOINT my said trustees to be trustees under the Conveyancing Acts to manage receive and apply the income of my real estate during the minority of any of my younger children and to exercise during such minority any of the powers of tenants for life under the Settled Land Acts I

Power to appoint trustees.

DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my wife during her widowhood and subject as aforesaid in the matter prescribed by law If my wife and the said [*names of above trustees*] shall all have predeceased me I declare that it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within six calendar months after my death not less than two fit persons as trustees of my will LASTLY I REVOKE all other wills IN WITNESS &c.

**NOTES to Precedent XIII.**

(*a*) This precedent disposes of the testator's property amongst his children *nominatim*. In case of the death of any child in the testator's lifetime leaving issue, any of whom survive the testator, the ownership of such deceased child's share would be governed by the provisions of 1 Vict. c. 26, s. 33 (*ante*, p. 77). But the will does not provide for after-born children, or for the possible case of the testator's wife being pregnant at the time of his death. This form, like the previous one, ought not to be adopted except in the case of a testator whose wife has passed the age of child-bearing.

(*b*) See note (*b*), Prec. XV.

(*c*) Powers of distress and entry for securing the rent-charge are now supplied by sect. 44 of the Conveyancing Act, 1881.

Advancement of infants.

(*d*) Without the sanction of the Court, trustees cannot with safety, in the absence of an express power, break in upon the capital of a trust fund for the advancement of an infant, *Walker* v. *Wetherell*, 6 Ves. 472. Powers of advancement must be followed strictly; for example, where a power was to be exercised with the concurrence of two trustees, an advancement made by one only was not allowed on passing the accounts, although that one alone had acted in the trust, *Palmer* v. *Wakefield*, 3 Be. 227; 52 R. R. 107. Where the trust fund is given over in case of the death of the infant under twenty-one, no part of the capital can be applied for the infant's advancement even by the Court in the absence of an express power created by the instrument, still less can the trustees apply the fund of their own authority, *Lee* v. *Brown*, 4 Ves. 362; 4 R. R. 208. However, an advancement may be made in such cases if the parties entitled in remainder, being competent, appear and give their consent, *Evans* v. *Massey*, 1 Y. & J. 196. See *Re Kershaw's Trusts*, L. R. 6 Eq. 322; 37 L. J. Ch. 751; 18 L. T. 899, as to a power to advance to a married woman "at any period of her life," justifying, under special circumstances, an advance to her husband; and where the power was to apply the fund at any time during the life of L. for his preferment or advancement, or otherwise for his benefit, it was held that the trustees might apply it in payment of debts incurred by L., *Lowther* v. *Bentinck*, L. R. 19 Eq. 166; 44 L. J. Ch. 197; 31 L. T. 719.

(*e*) See note (*b*), Prec. IV.

**Prec. 14.**

## No. XIV.

WILL *of a* MARRIED MAN, *providing for a Wife and Adult Children.—Bequest to Wife of Wines, &c., and the Use of Furniture.—Real Estate and Residue of Personal Estate vested in Trustees for Sale and Conversion; Income to Wife for Life.—Legacy out of Capital to one Child, and Surplus among the other Children.—Trustees not to sell real Estate in Wife's Lifetime without her Consent, and to be at liberty to postpone the Conversion of Personalty.—Power to appoint Trustees.—Appointment of Executors.*

Bequest of wines, &c., to wife.

Bequest of furniture, &c., to wife for life, then to fall into the residue;

—[*or*, to be divided between testator's children].

Inventory of furniture, &c., to be taken.

Real and residuary personal estate to trustees,

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I BEQUEATH the wines liquors fuel and other consumable household stores and provisions and the linen china and glass of which I shall die possessed to my wife [*name*] absolutely I BEQUEATH to my wife the use and enjoyment during her life of the household furniture (*a*) and effects not hereinbefore bequeathed and the plate books pictures and prints of which I shall die possessed And after her death I DIRECT the same articles to be disposed of as part of the residue of my personal estate [*or* I BEQUEATH the same to my four children [*names*] to be divided between them as nearly as may be in equal shares and if any dispute (*b*) shall arise concerning the division thereof then such division shall be made by the trustees or trustee for the time being of my will whose determination shall be final] AND I DIRECT my executors to cause an inventory to be taken of the same articles before the delivery thereof to my wife and two copies of such inventory to be signed by my wife of which copies one shall be delivered to her and the other be kept by my executors (*c*) I DEVISE all the real estate to which I shall be entitled at my death and I bequeath the residue of the personal estate to which I shall be then entitled to [*names &c.*] their heirs

Prec. 14.

executors administrators and assigns respectively UPON TRUST to sell my real and leasehold estates and to convert and get in my other residuary personal estate and invest the moneys to arise from such real and leasehold and residuary personal estate in the names or name of the trustees or trustee for the time being of my will I DECLARE that during the life of my wife the power to vary investments conferred by statute shall be exerciseable by my trustees only with her consent in writing AND UPON FURTHER TRUST to permit and empower my wife to receive the annual income of the said moneys or the stocks funds and securities whereon the same shall be invested during her life And after her death as to the same money stocks funds and securities and the annual income thenceforth to become due for the same UPON TRUST to pay thereout to my said son [*name*] his executors administrators or assigns the sum of £—— which sum shall be absolutely vested in him on my death (*d*) and shall carry interest after the rate of 4 per cent. per annum from the death of my wife until payment thereof And subject to the payment of the same sum and interest IN TRUST for my other children [*names*] to be divided equally among them their respective executors administrators and assigns the shares of such children to be absolutely vested in them on my death (*e*) I DECLARE that no sale of my real estate or any part thereof shall be made in the lifetime of my wife without her previous consent in writing and that my trustees or trustee for the time being shall have a discretionary power to postpone for such period as to them or him shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my death consist of stocks funds shares or securities of any description whatever but the unsold real estate and outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys stocks funds and securities aforesaid and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts and such real estate shall be transmissible as personal estate under the ultimate trust hereinbefore contained (*f*) I DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my wife

upon trust to sell, get in and invest.

Restriction on power to vary investments;

—to permit wife to receive the income for life;

—after her death to pay legacy to one of testator's children, with interest from her death;

—to divide the surplus between the other children.

Trustees prohibited from selling real estate in wife's lifetime without her consent, and empowered to postpone the conversion of personal estate—unsold real estate to be deemed personal.

Power to appoint new trustees.

**Prec. 14.**

during her life and subject as aforesaid in the manner prescribed by law Should my wife and the said [*names of above trustees*] all have predeceased me I declare that it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within six calendar months after my death not less than two fit persons as trustees of my will (*g*) I APPOINT the said [*trustee*] to be executors of my will LASTLY I REVOKE all other wills IN WITNESS &c.

Appointment of executors.

**NOTES to Precedent XIV.**

(*a*) See note (*b*), Prec. XV.

Executor's discretion; distribution of specific chattels.

(*b*) Where specific chattels are given to a number of persons in common, it seems necessary, or at all events desirable, to give to some person or persons a power to divide or distribute them, or to sell the whole and divide the proceeds. In the absence of such a power, what is to be done with (say) a collection of paintings bequeathed to six persons? each person taking an undivided sixth share in each picture, and the six being unable to agree to (or any one of them refusing to concur in) either a division or sale of the whole.

As to security required from legatees for life, or conditional legatees.

(*c*) This direction is in accordance with the rule of equity, by virtue of which the interference of the Court on the part of an ulterior legatee of chattels is at present restricted to the requisition of an inventory from the legatee for life. To support the demand of security, formerly required, a special case of actual danger must now be made out, *Foley* v. *Burnell*, 1 Br. C. 279; *Conduitt* v. *Soane*, 1 Col. 285. Indeed, even where a pecuniary legacy is made liable to be defeated by a subsequent contingency, the legatee (the time of payment having arrived) is entitled to receive it without giving security, as the Court will not exact from a legatee what the testator has not required. Thus, where a testator bequeathed 1,000*l.* to A., but on condition that, if she succeeded to a particular estate, by the determination of a certain estate tail then subsisting in B., the legacy should be void; it was held, that A. was entitled to be paid the legacy in the lifetime of B. without security, *Fawkes* v. *Gray*, 18 Ves. 131; 11 R. R. 168. See also *Griffiths* v. *Smith*, 1 Ves. 97; 1 R. R. 87.

Express direction as to vesting.

(*d*) Having regard to the established rules of construction respecting the vesting of estates and interests, this declaration may appear superfluous; but in preparing legal instruments in general, and more especially wills, some concession may be usefully made to popular notions; for it seems desirable, if possible, that wills should be so framed as to disclose the testator's intention to the most unlearned reader of the document. Considering how often the vesting of legacies is a subject of dispute, scarcely any degree of explicitness on the point can be deemed excessive.

**Notes to Prec. 14.**

(*e*) The children being named and not described as a class, the provisions of sect. 33 of the Wills Act will be applicable in case any child predecease the testator. See *ante*, p. 77.

Propriety of an express authority to suspend the conversion.

(*f*) A declaration to this effect should always be inserted where a discretionary power is lodged in trustees or others to suspend the conversion of the property, as otherwise the question occurs, whether the property is to be considered, for the purposes of transmission, as converted, until it actually becomes so. Where the direction to sell and convert forthwith is absolute and imperative, the doctrine that the property, in contemplation of equity, becomes immediately impressed with the qualities belonging to its destined character is so well settled and known (see *Fletcher* v. *Ashburner*, 1 Br. C. 499), that a clause declaratory of the testator's intention on the point is less important.

It is immaterial in regard to the converting effect of a direction to sell, whether the persons who are so directed to sell take the legal estate upon trust for sale, or only a power of sale, provided that the power is imperative, and therefore in the nature of a trust, *Elliott* v. *Fisher*, 12 Sim. 505.

Failure of purposes of conversion.

Where a testator directs the sale of realty for purposes which wholly fail, his heir takes as realty; but if the failure be partial only, the heir takes the surplus of the conversion fund as personalty, *Smith* v. *Claxton*, 4 Mad. 484; 20 R. R. 329; *Bagster* v. *Fackerell*, 26 Be. 469; *Wilson* v. *Coles*, 28 Be. 215; *Jessopp* v. *Watson*, 1 M. & K. 665; *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29; 43 L. J. Ex. 32; 29 L. T. 749; *In re Richerson*. '92, 1 Ch. 379; 61 L. J. Ch. 202; 66 L. T. 174.

See the doctrine of conversion discussed in the notes to *Fletcher* v. *Ashburner*, 1 Wh. & Tud. L. C. Eq.; and 1 Jarm. Wills, Ch. XIX.

(*g*) See note (*f*), Prec. VI.

**Prec. 15.**

## No. XV.

WILL *of a* MARRIED MAN *disposing of Personal Property in favour of his Wife and Children.—Furniture, &c., bequeathed to Wife absolutely; Income of Residue to Wife during Widowhood; Capital to Children and Issue living at her Death or Marriage, per Stirpes: Husbands and Widows of deceased Children to participate; Advancement.—Directions as to investment of Residue, with Power to continue Investments, and special Provisions as to what shall be deemed Income.—Power to appoint Trustees, &c.*

Appointment of executors and guardians.

Bequest of furniture to wife, and legacy for her immediate use.

Pecuniary legacy to brother.

Income of residue to wife during widowhood;

—capital to testator's children and issue living at her death or marriage *per stirpes;*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I REVOKE all former wills I APPOINT [*names &c.*] to be trustees and executors of my will and I APPOINT my wife [*name*] during her widowhood to be guardian and after her death or marriage the said [*trustees*] to be guardians of my infant children (*a*) I BEQUEATH the household furniture (*b*) plate linen china glass liquors fuel and housekeeping stores of which I shall die possessed to my wife absolutely and I also bequeath to her £—— for her immediate use to be paid within ten days after my death which legacy I declare shall be entitled to priority over every other bequest contained in my will (*c*) I BEQUEATH to my brother [*name*] the sum of £—— to be paid to him within six calendar months after my death and I direct that the same legacy shall not be deemed a satisfaction of the debt owing from me to him (*d*) I BEQUEATH the income of the residue of the personal estate of which I shall die possessed to my wife for her life if she shall continue my widow And on her death or marriage the capital with the future income of such residue to such children of mine then living and such issue then living of my children then dead as shall either before or after the death or marriage of my wife attain the age of twenty-one years or marry [*or* as being males

**Prec. 15.**

shall either before or after the death or marriage of my wife attain the age of twenty-one years or being females shall either before or after the same period attain that age or be married] as tenants in common in a course of distribution according to the stocks and not to the number of individual objects and so that the issue of a deceased child may take as tenants in common by way of substitution the share only which their parent would if living have taken But the widower or widow (if any) living at the period aforesaid of every deceased child of mine in the event of there not being any issue of the same child then living shall be substituted for the same child as an object of the preceding trust or in the event of there being any such issue then living shall take a life interest in the income of the share [*or* be entitled to one (*third*) part of the share] which the deceased child would if living have taken and also on failure eventually of the interest if contingent of the issue in the capital of the same share [*or* in the residue of the same share] be substituted for the deceased child as an object of the preceding trust I EMPOWER my trustees to apply after the death or marriage of my wife or during her widowhood with her consent in writing any part not exceeding a moiety of the capital of the contingent shares of the respective children and issue aforesaid in or towards their respective advancement in life I EMPOWER my trustees to permit my personal estate invested at my decease in or upon any stocks funds shares or securities whatsoever yielding income to continue in the same state of investment as long as they shall think fit but subject to such discretionary power I direct them to get in my residuary personal estate not consisting of authorised investments and to invest the proceeds in their names (*e*) [*Or* I EMPOWER my trustees at any time or times during the widowhood of my wife if they shall think fit so to do and I direct them after the death or marriage of my widow to convert or get in such part or parts of my residuary personal estate as shall not consist of authorised investments and to invest in their names the moneys to arise from the personal estate so converted or gotten in which moneys and the investments thereof shall be subject to the trust hereinbefore declared concerning my residuary personal estate AND I

—widowers and widows of deceased children to participate;

—advancement of children and issue.

Power to continue investments at interest—direction to get in and invest;

—[*or*, discretionary power during widowhood of wife, and direction after death or marriage, to convert personal estate—trustees authorised to permit wife

**Prec. 15.**

to receive the whole income of residue].

DECLARE that my trustees shall not incur any responsibility by permitting so much of my residuary personal estate as shall at my death be constituted of lifehold or leasehold interests or other determinable property (*f*) or be invested in or upon any stocks funds securities or other pecuniary investments whatsoever whether foreign or British real or personal permanent or determinable to remain wholly or in part so invested or by permitting my wife to receive the whole amount of the yearly produce thereof during her widowhood or by permitting so much of my residuary personal estate as shall not be so constituted or invested to remain unconverted or by permitting my wife to have the use or enjoyment thereof during her widowhood] I restrain my trustees from exercising during the widowhood of my wife the power of varying investments conferred by statute and also from exercising the foregoing power relative to the continuing of investments without her previous consent in writing I DECLARE that the actual yearly produce of my residuary personal estate whether consisting of investments to be made by my trustees as aforesaid or of investments of whatever nature to be continued by them as aforesaid shall as well during the first year after my death (and without any apportionment of periodical payments current at my decease) as in subsequent years be deemed the income of such personal estate for the purposes of my will I DECLARE that my wife shall while she remains my widow have the power to appoint new trustees of my will and that new trustees shall subject as aforesaid be appointed in the manner prescribed by law (*g*) IN WITNESS

Wife's consent made necessary.

The actual produce of investments to be deemed income.

Power to appoint trustees.

**NOTES to Precedent XV.**

(*a*) See note (*g*), Prec. XII.

Bequests of household furniture.

(*b*) Household furniture comprises everything that contributes to the use or convenience of the householder, or the ornament of the house, *Kelly* v. *Powlet*, Amb. 605. In that case books were held not to pass; but under a gift of the testator's furniture and all his other articles of domestic use or ornament, books have been held to pass, *Cornewall* v. *Cornewall*, 12 Sim. 303; 56 R. R. 61. Where a testator devised his dwelling-house, *garden and premises* to E. for her life, "and also all and singular the household furniture and other household effects" of and belonging to him in the said dwelling-house *and premises* at the time of

**Notes to Prec. 15.**

his decease, not only books, but wines and liquors, turning-lathes and a sawing-machine, a stock of ivory and mahogany, and a pair of pistols, were held to be included, *Cole* v. *Fitzgerald*, 1 S. & S. 189; 24 R. R. 169, and V.-C. Shadwell was of opinion that a pony, cow, and four fowling pieces would pass if proved to be kept for the (use and) defence of the house, and that a haystack, if for use, would pass, but not if it were for sale; see the same case, on appeal, 3 Rus. 301. Books and wines were held to pass by a bequest of all the testator's "furniture, linen, plate, pictures, carriages, horses, and other live and dead stock in his use and possession," *Hutchinson* v. *Smith*, 1 N. R. 513; 11 W. R. 417. In a bequest of all the furniture "except plate and pictures" in the testator's house at his death, it was held that the exception applied only to plate properly so called, and not to plated goods, *Holder* v. *Ramsbottom*, 4 Gif. 205. Under a bequest of all the goods and chattels whatsoever in and about testator's dwelling-house and outhouses at T. at his death, it was held that running-horses passed, *Countess Gower* v. *Earl Gower*, 2 Ed. 201. In *Lord Brooke* v. *Lord Warwick*, 2 De G. & S. 425; 79 R. R. 270, telescopes were held to pass under the words "household furniture"; and under a bequest of the pictures and books which might be at testator's death in, upon or about his mansion, it was held that pictures removed from the mansion to be cleaned, and books sent to be repaired, passed; but that articles purchased for the mansion, but not sent home at testator's death, did not pass; but as to these last-mentioned articles, compare *Field* v. *Peckett*, 29 Be. 573; 30 L. J. Ch. 813; 4 L. T. 459. So also in *Pellew* v. *Horsford*, 25 L. J. Ch. 352, an astronomical clock, which had been thirty years at a chronometer maker's, who had directions to sell it if a fair price could be obtained, passed under the specific bequest of testator's "household furniture." See also *Willis* v. *Curtois*, 1 Be. 189; 49 R. R. 340; *Field* v. *Peckett*, 29 Be. 573; 30 L. J. Ch. 813; 4 L. T. 459; *Domville* v. *Taylor*, 2 N. R. 258; 11 W. R. 796; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302; 34 L. T. 848. Where a testator bequeathed as follows: "all my interest in my house at L., the furniture, books, pictures, wines, &c., &c.," and after the date of his will removed from L., taking his furniture, &c., with him to S., where he afterwards purchased more of such articles, and subsequently died at S., it was held that the legatee was entitled to the furniture, books, pictures, wines and plate, which the testator had at his death, *Norris* v. *Norris*, 2 Col. 719; 70 R. R. 368; but see *Colleton* v. *Garth*, 6 Sim. 19; 38 R. R. 70; *Houlding* v. *Cross*, 1 Jur. N. S. 250. Words of locality thus placed in connection with gifts of chattels often render it doubtful whether they are intended to restrict the gift to the chattels actually at the locality referred to; but a general gift of all in a certain locality "or elsewhere" will pass the general personal estate, *Re Scarborough*, 6 Jur. N. S. 1166; 9 W. R. 149. A gift of furniture in a particular house will not pass plate sometimes there used, sometimes elsewhere, *Wilkins* v. *Jodrell*, 11 W. R. 588. A bequest of "household furniture" has been held to carry tenants' fixtures, *Paton* v. *Sheppard*, 10 Sim. 186; 51

Bequests of household furniture.

Words of locality as applied to chattels.

Fixtures.

**Notes to Prec. 15.**

R. R. 230; but, as a general rule, such a bequest will not pass the tenants' fixtures in a leasehold house occupied by the testator, *Finney* v. *Grice*, 10 Ch. D. 13; 48 L. J. Ch. 247; *In re Seton-Smith*, '02, 1 Ch. 717; 71 L. J. Ch. 386; 86 L. T. 322. See also Amos & Ferard, On Fixtures, 248 *et seq.*; and see *Norton* v. *Dashwood*, '96, 2 Ch. 497; 65 L. J. Ch. 737; 75 L. T. 205; and *Hill* v. *Bullock*, '97, 2 Ch. 482; 66 L. J. Ch. 705; 77 L. T. 240. The cases on bequests of "household furniture," "household goods," and "household stuff," will be found collected in 1 Rop. Leg. 253 *et seq.*; see also 1 Jarm. Wills, Ch. XXIII.; *Manning* v. *Purcell*, 7 D. M. & G. 55; *Tempest* v. *Tempest*, 2 K. & J. 635; also note (*c*), Prec. V.

(*c*) Where the personal estate is insufficient to pay all legacies in full, a legacy to the testator's wife for her immediate requirements is liable to abatement, though directed to be paid within a very short time of the testator's decease, unless there are words specially giving priority to it. *In re Schweder's Estate*, '91, 3 Ch. 44; 60 L. J. Ch. 656; 65 L. T. 64; following *Blower* v. *Morret*, 2 Ves. S. 420, and dissenting from *In re Hardy*, 17 Ch. D. 798; 50 L. J. Ch. 241; 44 L. T. 49.

Debts when satisfied by legacies.

(*d*) A gift by will *primâ facie* imports bounty; and yet, in spite of this seemingly obvious principle, it has been long an established doctrine that where a person who is under an obligation to pay a sum of money bequeaths by his will to his creditor a pecuniary legacy equal to, or greater than, the amount of such debt, he is presumed to mean to discharge the obligation, and not to confer an additional benefit on the legatee, except, indeed, so far as the legacy may happen to exceed the debt, *Brown* v. *Dawson*, Prec. Ch. 240; *Talbot* v. *Duke of Shrewsbury*, *ib.* 394; *Fowler* v. *Fowler*, 3 P. W. 353; *Reach* v. *Kennegal*, 1 Ves. S. 123; *Bensusan* v. *Nehemias*, 4 De G. & S. 381; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; *In re Fletcher*, 38 Ch. D. 373; 67 L. J. Ch. 1032; 59 L. T. 313. In the last case, North, J., held that it was not necessary either that the debt should still be in existence at the testator's death, or that the special purpose for which the legacy was given should appear in the will. See further, *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *In re Smythies*, '03, 1 Ch. 259; 72 L. J. Ch. 216; 87 L. T. 742; *In re Rattenberry*, '06, 1 Ch. 667; 75 L. J. Ch. 304; 94 L. T. 475. But a legacy of less amount is not a satisfaction even, *pro tanto*, *Eastwood* v. *Vinke*, 2 P. W. 613; and it seems that, where there are several debts, a legacy equal to one of them will not satisfy such debt, *Graham* v. *Graham*, 1 Ves. S. 262; nor in any case will a debt be satisfied by a general or residuary bequest, *Barret* v. *Beckford*, 1 Ves. S. 519; *Devese* v. *Pontet*, 1 Cox, 188; 1 R. R. 15; nor *à fortiori*, by the gift of something entirely different. Thus, the gift of an estate, or an annuity, would not bar the right of the devisee or legatee to a pecuniary debt, or *vice versâ*, *Cranmer's Case*, Salk. 508; *Broughton* v. *Errington*, 7 Br. P. 461; *Richardson* v. *Elphinstone*, 2 Ves. 463. It is clear, too, that a debt will not be satisfied by a legacy of equal or greater amount, payable expressly at a more distant period, *Nicholls* v. *Judson*, 2 Atk. 300; *Haynes* v. *Mico*, 1 Br. C. 129; *Adams* v. *Lavender*,

Doctrine of satisfaction does not apply—cases where.

**Notes to Prec. 15.**

Remarks on the doctrine of satisfaction of debts.

M'C. & Y. 41; nor will a debt, absolutely payable, be satisfied by a legacy which is subject to a contingency, *Tolson* v. *Collins*, 4 Ves. 483; 4 R. R. 264; though *contra*, it seems, if a legacy originally contingent becomes absolute from circumstances occurring in the lifetime of the testator, *Mathews* v. *Mathews*, 2 Ves. S. 635; *sed qu.* A very slight variation in the mode of payment, rendering the legacy less beneficial than the debt, is sufficient to rebut the presumption; such as the circumstances of the legacy being payable a month after the testator's death, and the debt *instanter*, *Clark* v. *Sewell*, 3 Atk. 96; or the circumstances that the debt is payable within three months of testator's death and no time is fixed for payment of the legacy, *Re Horlock*, '95, 1 Ch. 516; 64 L. J. Ch. 325; 72 L. T. 223; or (where the subject is an annuity) the circumstance of the bequeathed annuity having a later commencement than the annuity to which the legatee is entitled, *Richardson* v. *Elphinstone*, 2 Ves. 463; or of the former being subject to deductions from which the latter is exempt, *Atkinson* v. *Webb*, Pre. Ch. 236; nor is the effect of differences of this nature neutralised by a superiority in other respects, rendering the legacy upon the whole more valuable than the debt, *Lee* v. *Brown*, 4 Ves. 362; 4 R. R. 408. See also *Charlton* v. *West*, 30 Be. 124; *Smith* v. *Smith*, 3 Gif. 263. In *Wathen* v. *Smith*, 4 Mad. 325; 20 R. R. 302, it was held that the presumption of satisfaction was not negatived by the circumstance of the legacy being payable at an earlier period than the debt; but see *Cole* v. *Willard*, 25 Be. 568. If a deed by which the testator covenants to pay a sum of money at his death is contemporaneous with his will by which he gives a sum of the same amount to the covenantee, so that both documents are present to the donor's mind when he executes each of them, this is a strong reason against holding the gift in one to be a satisfaction of the obligation to pay, under the other, *Horlock* v. *Wiggins*, 39 Ch. D. 142; 58 L. J. Ch. 46; 59 L. T. 710.

A legacy given to a creditor in satisfaction of the testator's debt to him abates with the general legacies in case of insufficiency of assets. A debt forgiven by a will is a specific legacy, and does not abate with the general legacies, *In re Wedmore*, '07, 2 Ch. 277; 76 L. J. Ch. 486; 97 L. T. 26.

The doctrine of satisfaction does not apply to a debt due upon a negotiable security, which may not be in the hands of the legatee, *Carr* v. *Eastabrooke*, 3 Ves. 561; nor to a debt constituted of the balance of a running account, the result of which may be unknown to the testator, *Rawlins* v. *Powel*, 1 P. W. 299; nor, under the old law, was it applicable to debts contracted after the making of the will, *Cranmer's Case*, Salk. 508; nor where the will contains an express trust or direction for the payment of debts and legacies, *Chancey's Case*, 1 P. W. 408; *Richardson* v. *Greese*, 3 Atk. 65; *Hassell* v. *Hawkins*, 4 Drew. 468; and a direction to pay debts, without mentioning also legacies, is sufficient to rebut the presumption of satisfaction, *Pinchin* v. *Simms*, 30 Be. 119; *In re Huish*, 43 Ch. D. 260; 59 L. J. Ch. 135; 62 L. T. 52, disapproving *Edmunds* v. *Low*, 3 K. & J. 318.

**Notes to Prec. 15.**

Where a testator directed his executors and trustees to pay his just debts, including the debts not paid in full proved under a commission of bankruptcy, it was held that such a direction must be regarded as bounty, not only in favour of the creditors who survived the testator, but of the representatives of those who predeceased him, *Turner* v. *Martin*, 7 D. M. & G. 429.

Satisfaction of debts.

A post-obit covenant has been decided not to be a debt within the contemplation of a testator creating a trust for payment of debts, *Wathen* v. *Smith*, 4 Mad. 325; 20 R. R. 302; see also *Richardson* v. *Elphinstone*, 2 Ves. 463; a distinction which seems to be far from solid. It is certainly difficult to perceive the reasonableness of ascribing so much weight to a trust or direction to pay debts, as excluding the rule under consideration; but to distinguish between post-obit and other obligations is to refine on a refinement, and multiply the petty distinctions which have long exposed the doctrine which is the subject of this note to the reprehension of every judge whose attention has been drawn to it.

The judges have considered the doctrine as too firmly established to be broken through; but they have for years steadily refused to push the doctrine one step further than their predecessors had gone, and have gladly availed themselves of any circumstances however trifling, or discrepancies however slight, between the debt and the thing given, in order to remove cases out of a rule which has been judicially characterised as a "false principle," see Kindersley, V.-C., in *Hassell* v. *Hawkins*, 4 Drew. 470. The presumption of satisfaction is based upon the maxims *Debitor non presumitur donare*, and "Be just before you are generous"; but, as was remarked by Lord Chancellor King, *Chancey's Case*, 1 P. W. 408, "When a man left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, in such case I do not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides."

Whether servants' claims for wages are satisfied by legacies.

It is not quite clear whether debts owing to servants for wages are liable to be satisfied by legacies. In the case of *Richardson* v. *Greese*, 3 Atk. 69, Lord Hardwicke observed that legacies to servants had never been held to be in satisfaction of debts. No such exception was suggested in *Chancey's Case*, 1 P. W. 408, where the legatee was a servant; but the case did not raise the point; and it is observable that Lord Eldon, in *Wallace* v. *Pomfret*, 11 Ves. 546; 8 R. R. 241, where also the legatee was the testator's servant chose to rest his decision in favour of the legatee upon other grounds. Where a particular motive is assigned for the gift, satisfaction of a debt will not be presumed, *Mathews* v. *Mathews*, 2 Ves. S. 635; and any mention of lengthened or meritorious services, or an expression of the testator's esteem for the legatee, would probably be held to be a sufficient assignment of motive to remove the case from the operation of the rule; but the question should be prevented from occurring, by an explicit

**Notes to Prec. 15.**

declaration of the testator's intention that the legacy is to be in addition to the sum owing for wages.

See further respecting the satisfaction of debts by legacies, the notes to *Ex parte Pye*, 18 Ves. 140; 11 R. R. 173; *Sir John Talbot* v. *Duke of Shrewsbury*, Pre. Ch. 394; and *Chancey's Case* (*sup.*), in 2 Tud. L. C. Eq.

Satisfaction of portions.

But though the leaning of the Courts is against the presumption of satisfaction of debts, there is, on the other hand, a leaning in favour of the presumption of the satisfaction of portions by legacies. Where a legacy from a parent, or person *in loco parentis*, is as great as, or greater than, the portion previously secured to the legatee, such legacy is presumed to be intended as a complete satisfaction, *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; 4 R. R. 89; and so strong is the inclination of equity against double portions, that if the legacy be smaller in amount than the previous provision, it is presumed to be a satisfaction *pro tanto*, *Warren* v. *Warren*, 1 Cox, 41; and slight differences between the previous settlement and the will are not sufficient to rebut the presumption, *Hinchcliffe* v. *Hinchcliffe*, *sup.*; *Sparkes* v. *Cator*, 3 Ves. S. 530; *Tolson* v. *Collins*, 4 Ves. 490; 4 R. R. 264; *Pole* v. *Somers*, 6 Ves. 319; *Savage* v. *Carroll*, 1 Ba. & Be. 276; 12 R. R. 108; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; 46 L. J. Ch. 641; 35 L. T. 395. A bequest of a residue or the part of a residue may be a satisfaction of a portion, either altogether or *pro tanto* according to the amount, *Lady Edward Thynne* v. *Earl of Glengall*, 2 H. L. C. 131; 12 Jur. 805; 81 R. R. 77. The question of satisfaction is one of intention, *Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Montague* v. *Earl of Sandwich*, 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502; *In re Lacon*, '91, 2 Ch. 482; 60 L. J. Ch. 403; 64 L. T. 429; *In re Blundell*, '06, 2 Ch. 222; 75 L. J. Ch. 561; 94 L. T. 818, and a direction in the will to pay the testator's debts is a material circumstance, *Paget* v. *Grenfell*, L. R. 6 Eq. 7; 37 L. J. Ch. 833; but as to this, see *In re Tussaud's Estate*, 9 Ch. D. 363; 47 L. J. Ch. 849; 39 L. T. 113; *In re Vernon*, 95 L. T. 48. See also note (*a*), Prec. XXVI. And a gift of a partnership may satisfy a prior obligation to pay money, *In re Lawes*, 20 Ch. D. 81; 45 L. T. 453; and see *Bengough* v. *Walker*, 15 Ves. 507; 10 R. R. 106. But see also *In re Jaques*, '03, 1 Ch. 267; 72 L. J. Ch. 197; 88 L. T. 210.

A testator, on the marriage of his son, had covenanted to bequeath a sum not less than 2,500*l.*, to be held upon the trusts of the settlement; by his will he appointed 2,500*l.* out of a fund over which he had a special power of appointment in favour of his children, and to which his children were entitled in default, and he declared that such appointment should be taken in full discharge of the covenant; it was held that the appointment was not a satisfaction of the covenant, and that the covenant constituted a specialty debt of the testator for 2,500*l.*, *Graham* v. *Wickham*, 1 D. J. & S. 474.

Performance of covenants

Analogous to cases of satisfaction previously considered, but distinct therefrom (see 1 P. W. 324, n.; and 1 Sw. 220), are cases of performance

**Notes to Prec. 15.**

and satisfaction by intestacy.

of covenants to leave sums of money, or make other testamentary provisions, by allowing property to devolve by intestacy. The rule in this class of cases is, that where a person covenants to do a certain thing, and he does what is wholly or partially equivalent to the performance of his covenant, he shall be presumed to have so done with the intention of *pro tanto* performing his covenant. Thus A. covenanted on his marriage to purchase lands worth 200*l.* per annum, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail; he purchased the lands, but made no settlement, and on his death the lands descended to the eldest son; it was held that the lands descended were a satisfaction of the covenant, *Wilcocks* v. *Wilcocks*, 2 Ver. 558. Again, A. covenanted, before marriage, to leave his intended wife 620*l.*; the marriage took place, and A. died intestate; the wife's share of his property amounted to more than 620*l.*, and this was held to be a satisfaction, *Blandy* v. *Widmore*, 1 P. W. 323. See also *Thacker* v. *Key*, L. R. 8 Eq. 408. That covenants may be in this way executed in part, see *Lechmere* v. *Lord Carlisle*, 3 P. W. 227; *Garthshore* v. *Chalie*, 10 Ves. 1.

Covenant not satisfied by a residue, or distributive share.

But a gift by will of a residue will not, *per se*, be considered a performance of a covenant to leave a widow a certain sum, *Devese* v. *Pontet*, 1 Cox, 188; 1 R. R. 15. Where a husband covenanted to pay the interest of a sum of money to his widow for her life, this was held not to be satisfied by her distributive share on his intestacy, *Couch* v. *Stratton*, 4 Ves. 391; 4 R. R. 230. So also a covenant to leave an annuity to a widow is not performed by a distributive share devolving on the death of the husband intestate, *Salisbury* v. *Salisbury*, 6 Ha. 526; 17 L. J. Ch. 480.

As to a covenant by a father, upon the marriage of his daughter, that he would, either by act *inter vivos*, or by will, provide for his daughter, who, however, died in her father's lifetime, see *Jones* v. *How*, 7 Ha. 267; 17 L. J. Ch. 369, in which case the Court of C. P. certified that the representative of the daughter had no good cause of action against the executors of the father, and the Equity Court concurred in the certificate. Where the covenant is to provide by will, the covenantor is not bound so to frame his will as to guard the child's interest against lapse, *Re Brookman's Trust*, L. R. 5 Ch. 182; 38 L. J. Ch. 585; and see L. R. 6 Ex. 302.

Separate property of married woman paid to husband, a debt undischarged by legacy of larger sum.

A sum of 600*l.*, to which a married woman was entitled for her separate use, was paid to her husband, who by his will gave her 2,800*l.*, and directed his executor to pay all his debts, and to take all the residue of his property; the husband died, the widow received the 2,800*l.*, and executed a general release to the executor as to all matters under the will; the widow filed her bill for the payment of the 600*l.*; it was held that the 600*l.* existed as a debt, and that the legacy of 2,800*l.* was not intended to be in satisfaction of such debt; and that the widow was entitled to payment, notwithstanding the execution of the release, *Rowe* v. *Rowe*, 2 De G. & S. 294; 79 R. R. 214.

Where the husband covenants to pay money in his lifetime, a

**Notes to Prec. 15.**

distributive share is no satisfaction; in such a case there is an actual breach, not a performance, of the covenant, and a debt is due to the wife, *Oliver* v. *Brickland* or *Brighouse*, cited 1 Ves. S. 1; 3 Atk. 420; 10 Ves. 12.

See further as to performance of covenants and satisfaction by intestacy, the notes to *Wilcocks* v. *Wilcocks*, 2 Ver. 558; and *Blandy* v. *Widmore*, 1 P. W. 323; in 2 Tud. L. C. Eq.

(*e*) See note (*b*), Prec. IV.

Suggestions with respect to trusts for sale and conversion.

(*f*) Devises and bequests in trust, which impose on the devisees and legatees the duty of converting the property (and almost every residuary disposition includes an express or implied trust of this nature to some extent), are often defective in not giving to the trustees a discretionary power to postpone the conversion, and in omitting to dispose of the income in the meantime. An instance of the latter kind of omission occurs where a testator directs his real and personal estate to be sold, and the produce to be laid out in government or real security, of which the income is given to a person for life, with a gift over of the capital. According to the literal terms of the will, the legatees take nothing until the sale, which might be deferred, either from circumstances inevitably preventing it, or from the negligence of the trustees, for a considerable period. Such an extended postponement of the legatee's interest clearly is not meant. In comparison with such a scheme an approach to the intention would probably be made, by permitting the legatee for life to take the income of the property while unsold; but this is unauthorised by the words of the will, for they give only the income of the fund constituted of the proceeds, which obviously might yield a very different amount. For instance, supposing part of the residue to consist of leaseholds held for a short term of years; to defer the sale and pay over the rents to the legatee for life, would place an undue advantage in his hands, at the expense of the ulterior legatees: while, on the other hand, if the subject-matter were a reversion, the delay in the conversion of the property would be no less unfairly advantageous to those legatees. Equal justice to these respective parties seems to require that some period should be fixed (irrespectively not only of the greater or less degree of activity of the trustees in effecting a sale, but also, even of circumstances which might, probably or necessarily, delay and impede it), at which the property shall for this purpose be considered as sold, and the parties placed, so far as may be practicable, in the same situation as if the sale had then taken place; or, in other words, that there should be a period of constructive conversion, distinct from and independent of the actual conversion. And this we shall find has been effected, not only where the income accruing before the sale or conversion of the property is undisposed of, but also where the intermediate income is expressly directed to be accumulated; for even in the latter case, it is not to be supposed that the testator intended that the beneficial interests of the legatees should be subject to all the accidents by which the sale is liable to be deferred.

**Notes to Prec. 15.**

Rules deduced from the cases.

The following positions exhibit the doctrine of the cases:—*First.* In the ordinary case of residuary property being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) invested upon authorised security, for the benefit of a person for life, at whose death the capital is given to other persons, without any direction to accumulate the profits accruing before the conversion, the income arising from such part of the residue as at the time of the testator's death was invested in securities of the kind authorised by the will, belongs to the residuary legatee for life from the period of the testator's death, *Hewitt* v. *Morris*, T. & R. 241; 24 R. R. 39; *Angerstein* v. *Martin*, T. & R. 232; 24 R. R. 32; *Dimes* v. *Scott*, 4 Rus. 195; 28 R. R. 46; *Douglas* v. *Congreve*, 1 Ke. 410; 44 R. R. 103; *Caldecott* v. *Caldecott*, 1 Y. & C. 737; 57 R. R. 345. *Secondly.* In the case last described, the destination of the income arising within the year from such part of the residue as falls within the scope of the converting trust (the same not being composed of or invested upon securities such as are authorised by the will) is more doubtful: it is now settled that the tenant for life is entitled from the death of the testator, *Macpherson* v. *Macpherson*, 1 Macq. 243; 16 Jur. 847; 93 R. R. 865; but the difficulty still remains in what manner is he to have the benefit of the rule as between himself and those entitled in remainder? The true principle seems to be that, with respect to that part of the residue which at the testator's death is not invested in authorised securities, the tenant for life, during the first year after testator's death, is entitled to so much income as the property would have produced if invested according to the will, *Dimes* v. *Scott*, 4 Rus. 209; 28 R. R. 46; *Taylor* v. *Clark*, 1 Ha. 161; 11 L. J. Ch. 189; *Morgan* v. *Morgan*, 14 Be. 72; *Holgate* v. *Jennings*, 24 Be. 623; *Re Llewellyn's Trust*, 29 Be. 171; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; 17 L. T. 131; *Wentworth* v. *Wentworth*, '00, A. C. 163; 69 L. J. P. C. 13; 81 L. T. 682. *Thirdly.* Where trustees are directed to convert the property, and, until the conversion, the income is to be added to the capital, and the conversion is deferred beyond the period of a year from the testator's death, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year from the testator's death, this being considered to afford a reasonable time for the conversion of the property, *Sitwell* v. *Bernard*, 6 Ves. 520; 5 R. R. 347, and the cases there cited, *Kilvington* v. *Gray*, 2 S. & S. 396; *Vicars* v. *Scott*, 3 M. & K. 500; *Tucker* v. *Boswell*, 5 Be. 607; 59 R. R. 575. *Fourthly.* With respect to such portion of the property as is converted before the end of the year following the testator's death, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its investment, and that too without regard to the fact whether there was or was not a trust to accumulate the profits until conversion, *La Terriere* v. *Bulmer*, 2 Sim. 18. *Fifthly.* If the property is not actually converted at the end of a year the legatee for life will be entitled to the dividends which would

**Notes to Prec. 15.**

have accrued from the investment at that time on authorised securities. And this rule applies as well where the fund or property is of a permanent nature, as where it is terminable and temporary, as leaseholds, long annuities, &c., *Dimes* v. *Scott*, 4 Rus. 209; 28 R. R. 46; *Mills* v. *Mills*, 7 Sim. 501; 40 R. R. 176; *Tickner* v. *Old*, L. R. 18 Eq. 422; 31 L. T. 29.

Where property is left on trust for conversion and out of the proceeds to pay a fixed sum to A. and the residue to B., and conversion is postponed, and the estate becomes greatly increased in value, A. has no claim to any share of such increased value, but only to his fixed sum with usual interest, *Re Campbell*, '93, 3 Ch. 468; 62 L. J. Ch. 878; 69 L. T. 134.

Remarks upon *Dimes* v. *Scott*.

The principle of distribution established by the case of *Dimes* v. *Scott* would, it is conceived, apply, even where the residuary clause contained no express trust for conversion, with respect to property of a limited duration, such as leaseholds for short terms, terminable annuities, &c., the income arising from which ought, from the period of the testator's death, to be carried to account as capital; and in lieu of such income the executors should pay to the legatee for life, from the testator's decease, such sum as the dividends on authorised securities, purchased with the actual produce of the sale, would amount to, in case the sale takes place within a year from the testator's death; and if not, then such sum as would be equal to the dividends arising from the investment of the proceeds of the sale, in case the same had been made at the year's end, together, in either case, with dividends on the interim income of the terminable unconverted property, *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; 6 R. R. 96; *Fearns* v. *Young*, 9 Ves. 549; *Mills* v. *Mills*, 7 Sim. 501; *Re Whitehead*, '94, 1 Ch. 678; 63 L. J. Ch. 229; 70 L. T. 122 (terminable annuity—no trust for conversion); but see *Crawley* v. *Crawley*, 7 Sim. 427; 40 R. R. 170; and *Sutherland* v. *Cooke*, 1 Col. 503; 66 R. R. 162, where interest at four per cent. was allowed to the tenant for life. And it makes no difference that the life interest is interposed by codicil, *Macdonald* v. *Irvine*, 8 Ch. D. 101; 47 L. J. Ch. 494.

With respect to that part of a residue not expressly directed to be sold, which is undergoing no diminution by lapse of time, and is invested on permanent real securities, it is clear that the doctrine in question would not apply, but that the executor would be warranted in paying to the residuary legatee for life the income of the property, according to its actual state, *Mills* v. *Mills*, 7 Sim. 501; 40 R. R. 176; *Howe* v. *Earl of Dartmouth*, *sup.*; *Morgan* v. *Morgan*, 14 Be. 72. And even in regard to decaying property, the doctrine which requires its conversion, and an investment of the proceeds in a permanent fund, will, of course, yield to expressions showing that the testator meant to give the legatee for life the actual income, according to the existing state of the property, *Vincent* v. *Newcome*, 1 You. 599; 34 R. R. 298; *Cockran* v. *Cockran*, 14 Sim. 248; *Boys* v. *Boys*, 28 Be. 436; *Re Elmore's*

Question whether legatee for life is entitled *in specie*.

**Notes to Prec. 15.**

*Will*, 3 L. T. 359. *A fortiori*, trustees are not justified in converting into a permanent stock Terminable Annuities which are specifically bequeathed in trust for a person for life, and then to other persons absolutely, *Lord* v. *Godfrey*, 4 Mad. 455; see also *Neville* v. *Lord Fortescue*, 16 Sim. 333; *Hubbard* v. *Young*, 10 Be. 203; 16 L. J. Ch. 182; 76 R. R. 118; *Goodenough* v. *Tremanondo*, 2 Be. 514, n.; 50 R. R. 262; as to leaseholds, *Hind* v. *Selby*, 22 Be. 373. Even a residuary legatee for life has been held to be entitled to the income of property of a wasting nature, the ulterior subject of gift and the intermediate interest of the *cestui que trust* for life being respectively described in terms applicable to the actual condition of the property, *Alcock* v. *Sloper*, 2 M. & K. 699; 39 R. R. 334; *Collins* v. *Collins*, 2 M. & K. 703; 39 R. R. 237; *Pickering* v. *Pickering*, 4 M. & C. 289; 48 R. R. 5; *Harvey* v. *Harvey*, 5 Be. 134; 59 R. R. 435; *Wrey* v. *Smith*, 14 Sim. 202; 65 R. R. 558; *Burton* v. *Mount*, 2 De G. & S. 383; *Hinves* v. *Hinves*, 3 Ha. 609; *Skirving* v. *Williams*, 24 Be. 275; *Rowe* v. *Rowe*, 29 Be. 276; *Vachell* v. *Roberts*, 32 Be. 140; *Re Sewell's Estate*, L. R. 11 Eq. 80; 40 L. J. Ch. 135; 23 L. T. 835; *Thursby* v. *Thursby*, L. R. 19 Eq. 395; 44 L. J. Ch. 289; 32 L. T. 187. Another instance of the same kind (though here none of the property seems to have been of a wasting nature) is afforded by the case of *Sparling* v. *Parker*, 9 Be. 524, where a testator, after directing an investment of all his moneys, and the amount of all such mortgages, &c., as might be immediately sold without disadvantage, to be invested in the purchase of lands, gave the interest, rents, and profits accruing from every part of his real and personal estate until converted into real property unto E. for life: it was held that E. was entitled to the actual income of mortgages and shares from the death of the testator until conversion. But in *Benn* v. *Dixon*, 10 Sim. 636; 51 R. R. 328, where a testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life: and in case he should die without issue he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister; the testator died possessed of leasehold, and also of real property: it was held that the widow was not entitled to the leasehold property *in specie* during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it. Again, in *Pickup* v. *Atkinson*, 4 Ha. 624; 67 R. R. 163, where a testator, after a specific gift of certain leasehold houses to his wife for her life, she paying the ground rents and performing the covenants, with remainder over to his nephew, bequeathed the "rents and profits, dividends and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons; it was held that the widow was not entitled to the enjoyment *in specie* during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. In *In re Game*, '97, 1 Ch. 881; 66 L. J. Ch. 505; 76 L. T. 450, a testator directed that the rents and

Residuary legatee for life held to be entitled to actual income.

**Notes to Prec. 15.**

profits of his residuary real and personal estate should be paid to his wife for life; and after her decease he gave his residuary estate to others, in succession, subject to certain annuities, and conferred on the annuitants a power of distress. The residuary estate consisted of freeholds and leaseholds. *Held*, that neither the direction to pay rents nor the power of distress afforded any sufficient indication of an intention that the leaseholds should be enjoyed *in specie*. See also *Chambers* v. *Chambers*, 15 Sim. 183; 15 L. J. Ch. 318; 74 R. R. 56; *Johnson* v. *Johnson*, 2 Col. 441; 70 R. R. 288.

If the will authorises the retention of securities which under the will would not be authorised investments, and those securities are not of a wasting nature, the tenants for life will be entitled to receive *in specie* the income of those securities, *In re Sheldon*, 39 Ch. D. 50; 58 L. J. Ch. 25; 59 L. T. 133.

Where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention does not necessarily give the tenants for life the enjoyment *in specie* of the securities retained by the trustees in the exercise of their discretion. But the Court will look with an expectant eye for a direction that the tenant for life shall receive the income of the retained securities. See *In re Thomas*, '91, 3 Ch. 482; 60 L. J. Ch. 781; 65 L. T. 142; *In re Chaytor*, '05, 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290. Where there is a gift of the testator's general estate upon trust for conversion, and the will contains a power to postpone conversion, with the usual direction that until conversion the income shall be applied in the same manner as the income of the trust estate after conversion, and the trustees carry on a business carried on by the testator, the profits of such business will be payable to the tenant for life as income, *Re Chancellor*, 26 Ch. D. 42; 53 L. J. Ch. 443; 51 L. T. 33; *Re Crowther*, '95, 2 Ch. 56; 64 L. J. Ch. 537; 72 L. T. 762.

In later doubtful cases, tendency in favour of life tenant.

In the application of the rule for conversion, at the testator's death, into permanent investments, of perishable or wasting property in which he has given interests for life and other interests in succession, the leaning of the Courts in the later cases has been in favour, when the meaning was doubtful, of that construction which would give to the tenant for life the enjoyment of the property *in specie*.

Bequests, specific or residuary.

The point, however, is frequently embarrassed by the fact that the testator has thrown into the general residuary bequest a specification of certain species of property; thereby raising the question whether the bequest is not, as to such specified property, to be considered as a specific gift; as in *Bethune* v. *Kennedy*, 1 M. & C. 114; 43 R. R. 153; and *Vaughan* v. *Buck*, 1 Ph. 75; 65 R. R. 337, where the persons to whom the residuary personal estate was bequeathed for life were held to be entitled to the enjoyment *in specie* of certain enumerated particulars forming part of the residue.

**Notes to Prec. 15.**

It may be observed, that the mere fact of the testator having expressly directed the sale and conversion of a portion of his residuary property is not sufficient of itself to take the rest of the property out of the general rule, and entitle the tenant for life to an enjoyment *in specie*, *Cafe* v. *Bent*, 5 Ha. 24.

Actual income until conversion should be expressly given.

In order to prevent questions of this nature, and to relieve executors and trustees from the onerous task of entering into the complex calculations which the doctrine of some of the cases would require, every will ought to contain a direction entitling the beneficial legatee for life to the actual income of the property until conversion, whether derived from temporary or permanent sources, *In re Norrington*, 13 Ch. D. 654; thereby reconciling the legal duty with the ordinary conduct of executors and trustees, and giving effect to the intention of the testators, which, there can be little doubt, is commonly defeated by applying the principle of *Dimes* v. *Scott*, *ante*, p. 281. In general, too, trustees, who are directed to sell ought to be expressly invested with a discretion as to the period of sale, *Gray* v. *Siggers*, 15 Ch. D. 74; 49 L. J. Ch. 819; *Walker* v. *Shore*, 19 Ves. 387; 10 R. R. 41. Where there has been no undue delay on the part of the trustees in converting the property, and the will contains a clause entitling the tenant for life to the actual income, no allowance is made to him for any portion of the estate which is unproductive, *Mackie* v. *Mackie*, 5 Ha. 70; 71 R. R. 39. In *In re Pitcairn*, '96, 2 Ch. 199; 65 L. J. Ch. 120; 73 L. T. 430, where the question arose with reference to a reversionary interest, it was held that a discretion as to conversion given to the trustees excluded the application of the rule in *Howe* v. *Dartmouth*. See also *In re Bentham*, 94 L. T. 307.

Discretion as to period of conversion.

See further, on the conversion of residue bequeathed to persons in succession, *Howe* v. *Lord Dartmouth*, 7 Ves. 137; 9 R. R. 96, and the notes thereto, in Tud. L. C. Eq.; and on a power to convert personalty into realty, *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524; 88 R. R. 191. See also *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Stroud* v. *Gwyer*, 28 Be. 130, cases relating to partnership property.

As to appointment between capital and income of reversionary interests, or outstanding sums, when received, which, whether the subject of a trust for conversion or not, have not been realised, either in consequence of a discretion by trustees to postpone conversion or otherwise, see *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; 52 L. J. Ch. 958; 49 L. T. 261; *Re Godden*, '93, 1 Ch. 292; 62 L. J. Ch. 469; 68 L. T. 116; *Re Hengler*, '93, 1 Ch. 586; 62 L. J. Ch. 383; 68 L. T. 84; *Re Goodenough*, '95, 2 Ch. 537; 65 L. J. Ch. 71; 73 L. T. 152; *Re Cleveland's Estate*, '95, 2 Ch. 542; 65 L. J. Ch. 29; 73 L. T. 313; *Re Morley*, '95, 2 Ch. 738; 64 L. J. Ch. 727; 73 L. T. 151; *In re Hubbuck*, '96, 1 Ch. 754; 65 L. J. Ch. 271; 73 L. T. 738.

(*g*) See note (*f*), Prec. VI.

## No. XVI.

WILL *of a* WIDOWER, *disposing of Real and Personal Property in favour of his Children with ulterior Trusts in favour of other Objects.—Real and Personal Estate vested in Trustees for Sale and Conversion; Produce to be invested, and Fund divided among the Children equally, with Provisions for Maintenance and Advancement; but a Moiety of each Child's Share is Settled upon Trust for the Child and its Issue.—Power to appoint Trustees.—Appointment of Executors, with Legacies for their Trouble.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I DEVISE my farm and lands situate in the parish of —— in the county of —— partly in my own occupation and partly in the occupation of [*tenant*] to my eldest son [*name*] in fee simple (*a*) I DEVISE all other the real estate and bequeath all the personal estate which shall belong to me at my death to [*trustees*] UPON TRUST to sell and convert into money my said real and personal estate when and as the trustees or trustee for the time being of my will shall in their or his discretion deem it most advantageous so to do And I declare that in the meantime and until the sale thereof respectively such real and personal estate and the rents interest and yearly produce thereof respectively shall be subject to the trusts and provisions hereinafter contained concerning the money to arise therefrom and the income of such money And that such real estate shall be considered as converted in equity from the time of my death for the purposes of such trusts and provisions AND I DIRECT my trustees or trustee for the time being to invest the money to arise from the real and personal estate to be sold and gotten in as aforesaid in the names or name of the said

Devise of specific lands in fee.

General devise of other real estates and bequest of personal estate to trustees, upon trust to sell and get in, &c.;

—unsold real estate to be deemed personal;

—to invest produce of real and personal estate;

**Prec. 16.**

trustees or trustee (*b*) And as to the money to arise as aforesaid and the stocks funds and securities whereon the same shall be invested (which moneys stocks funds and securities are hereinafter designated " my trust fund ") my said trustees or trustee shall stand possessed thereof IN TRUST for my child if only one wholly or for my children if more than one in equal shares But if any of them shall die under the age of twenty-one years without having married [*or* if any of them being a son or sons shall die under the age of twenty-one years or being a daughter or daughters shall die under that age without having been married *or* if any of them shall die under the age of twenty-one years without leaving issue (*or* without leaving a husband or widow or issue) living at his or her death] then as to as well the share originally limited under the preceding trust as the shares eventually limited under this executory trust to any and every child so dying IN TRUST for the others and other (*c*) of my children and if more than one in equal shares And if there shall not be any child of mine who shall attain the age of twenty-one years or marry [*or* who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married *or* who shall attain the age of twenty-one years or dying under that age shall leave issue (*or* leave a husband or widow or issue) living at his or her death] then as to my said trust fund IN TRUST for [*name*] if he shall be living at the failure of the preceding trusts in favour of my child or children for his absolute use But if he shall not be then living IN TRUST for such of the several persons following (namely) [*names*] as shall be then living to take if more than one in equal shares And if none of them shall be then living IN TRUST for such issue then living of the last-named persons as shall either before or after the vesting in possession of this trust attain the age of twenty-one years or marry to take if more than one as tenants in common and distributively according to the stocks PROVIDED ALWAYS that it shall be lawful for my said trustees or trustee to apply in or towards the maintenance and education or otherwise for the benefit of each child of mine entitled under the trusts aforesaid to a share not absolutely vested one moiety of the

—for testator's children equally, with benefit of accruer;

[—different periods of absolute vesting;]

—on failure of the previous trusts;

—for a person named, if then living; if not,

—for such several persons named as shall be then living; if none,

—for their issue then living, *per stirpes*,

Maintenance clause.

[Different modes of maintenance.]

**Prec. 16.**

annual income of such share [*or* the annual sum of £—— (*or* any annual sum not exceeding the sum of £——) out of the income of such share] And I DIRECT my said trustees or trustee to accumulate the unapplied surplus of such income in augmentation of the capital whence such income shall have proceeded PROVIDED FURTHER that it shall be lawful for my said trustees or trustee to apply in or towards the advancement in life or establishment in business of each child entitled as aforesaid any part not exceeding one-third part of the capital of his or her share [*or* any part of the capital of his or her share not exceeding £——] PROVIDED FURTHER that my said trustees or trustee shall retain and stand possessed of one moiety of the share which shall become absolutely vested in each child of mine under the trusts aforesaid upon the trusts following (namely) UPON TRUST to pay the annual produce to the same child being of the age of twenty-one years for his life or her life and if the same child shall be a daughter and married then for her separate use and not by way of anticipation And after the death of the same child IN TRUST for all or any of the children and more remote issue of the same child (such more remote issue to be born in the lifetime of the same child) in such manner as the same child shall by deed or will appoint And in default of appointment UPON TRUSTS and subject to provisions in favour of the children of the same child corresponding with the trusts and provisions hereinbefore contained in favour of my own children (exclusive of the trusts declared by this proviso) but so that no appointee under the aforesaid power of appointing to children and issue shall participate in the unappointed fund without bringing the appointed share or interest into hotchpot And if there shall not be any child of the same child who shall attain, &c. [*as before in respect of testator's children*] then if the same child shall be a son IN TRUST for his absolute use or if the same child shall be a daughter IN TRUST for such persons and in such manner as she shall by will appoint And in default of appointment IN TRUST for such persons exclusive of a husband as shall at her death be her next of kin entitled as such to her personal estate under the statutes for the distribution of

Advancement clause.

Trustees to hold a moiety of each child's share upon trusts,

—for the same child for life;

—for the child's issue, as the child shall appoint;

—for the child's children, by reference to the previous trusts for the testator's children;

—for the child absolutely, if a son;

—if a daughter, for such persons as she shall by will appoint;

—in default, for her next of kin.

**Prec. 16.**

Shares of children dying in testator's lifetime subjected to the trusts of the above moiety.

the personal estate of intestates and in the proportions in which they would be so entitled PROVIDED FURTHER that if any child of mine shall die in my lifetime and any issue of such child shall be living at my death then the share which any or every such child of mine would if living have taken of my said trust fund shall be subject to the same trusts and provisions in favour of the children of the same child as are hereinbefore referentially declared of a moiety of the share of each child of mine and as shall be capable of taking effect but so subject shall follow the destination of the residue of my said trust fund PROVIDED FURTHER that should both the said [*names of above trustees*] die in my lifetime it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within [*six*] calendar months of my death new trustees in the place of those hereinbefore appointed I APPOINT the said [*trustees*] to be executors of my will and request each of them to accept a legacy of £—— to be retained at the end of three calendar months from my death as an acknowledgment for the trouble he will have in the execution of my will AND I REVOKE all former wills and codicils IN WITNESS &c.

Power to appoint new trustees.

Appointment of executors.

Legacy to executors.

**NOTES to Precedent XVI.**

As to the exoneration of devised estates in mortgage.

(*a*) Previously to Locke King's Act (17 & 18 Vict. c. 113), the heir-at-law or devisee of mortgaged real estate, in accordance with the general rule that a testator's personalty is the primary fund for the payment of his debts unless expressly or by clear implication exempted therefrom, was entitled to have the land exonerated from the mortgage, and might require that the charge should be satisfied out of the general personal estate of the testator, unless in the case of a devise it was manifest from the will that the devisee was intended to take the estate subject to the charge.

17 & 18 Vict. c. 113, Locke King's Act.

Testator dying after 31st Dec., 1854.

By Locke King's Act it was enacted that:—

"When any person shall after the thirty-first day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or

**Notes to Prec. 16.**

any other real estate of such person, but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof: provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will deed or document already made or to be made before the first day of January, 1855."

Mortgaged land primarily liable to payment of mortgage.

Proviso as to rights of mortgagee, and persons claiming under will, &c., made before 1855.

A lien for unpaid purchase-money was not a charge by way of mortgage within this Act, *Hood* v. *Hood*, 26 L. J. Ch. 616; *Barnwell* v. *Iremonger*, 1 Dr. & S. 260. But by 30 & 31 Vict. c. 69, s. 2, the word "mortgage" is made, in the construction of the Act, to extend to such a lien, see *In re Cockroft*, 24 Ch. D. 94; 52 L. J. Ch. 811; 49 L. T. 497; however, the case of an intestate purchaser was not thereby provided for, *Harding* v. *Harding*, L. R. 13 Eq. 493; 41 L. J. Ch. 523; 26 L. T. 656. Copyholds are within the Act, *Piper* v. *Piper*, 1 J. & H. 91; 29 L. J. Ch. 719. The heir-at-law of a testator, taking by descent an estate which has been the subject of a lapsed devise in a will, is not a person claiming "under or by virtue of any will" within the meaning of the proviso, *Nelson* v. *Page*, L. R. 7 Eq. 25; 38 L. J. Ch. 138; 19 L. T. 447; and the proviso does not apply to the case of a person claiming as heir whose ancestor acquired the property by a "deed or document" executed before 1855, *Piper* v. *Piper*, *ubi sup.*; nor does it save a right to the heir to be exonerated from a mortgage debt out of personalty bequeathed by a will made before 1855, *Power* v. *Power*, 8 Ir. Ch. Rep. 340. But where a testator, by a will made in 1847, devised an estate which was in mortgage, and in 1861 made a second will which did not affect the claim of the devisee, it was held that the devisee, claiming solely under the will of 1847, was within the proviso, and was entitled to have the mortgage paid out of the personal estate, *Rolfe* v. *Perry*, 3 D. J. & S. 481; 32 L. J. Ch. 471; 8 L. T. 441.

30 & 31 Vict. c. 69, s. 2.

Copyholds.

By 40 & 41 Vict. c. 34, it is enacted that the last-mentioned Acts "shall as to any testator or intestate dying after the 31st December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention, and such contrary intention shall not be

40 & 41 Vict. c. 34.

**Notes to Prec. 16.**

deemed to be signified by a charge of or direction for payment of debts upon or out of the residuary real and personal estate, or residuary real estate."

Leaseholds are now within the Act, *Re Kershaw*, 37 Ch. D. 674; 57 L. J. Ch. 599; 58 L. T. 512. As to what amounts to a lien for unpaid purchase money within the meaning of the Act, see *Re Kidd*, '94, 3 Ch. 558; 63 L. J. Ch. 855; 71 L. T. 481.

It would seem that a share in the proceeds of sale of freeholds devised upon trust for sale is not an "interest in land" within the meaning of the Act, *Lewis* v. *Lewis*, L. R. 13 Eq. 218; 41 L. J. Ch. 195; 25 L. T. 555.

Equitable mortgage.

An equitable mortgage of freeholds, by deposit of deeds and memorandum, is within the Act, *Pembrooke* v. *Friend*, 1 J. & H. 132; 2 L. T. 742; *Coleby* v. *Coleby*, L. R. 2 Eq. 803; 14 L. T. 697; in the latter case the deposit was a collateral security for a sum borrowed on promissory note. And the absence of a memorandum makes no difference, *Davis* v. *Davis*, 24 W. R. 962.

Notwithstanding the words "as between the different persons claiming through or under the deceased," the Act applies in favour of the Crown claiming personalty for want of next of kin, *Dacre* v. *Patrickson*, 1 Dr. & S. 186; 29 L. J. 846.

The Act applies only where there is a defined and specified charge on a specified estate, *Hepworth* v. *Hill*, 30 Be. 476. And see *In re Dunlop*, 21 Ch. D. 583, 590; 48 L. T. 89.

"Contrary intention" to exclude the Act.

It is impossible to lay down a general rule as to what is a sufficient signification by a testator of an intention to exclude the operation of the Act; in each case the intention must be gathered from the whole will, *Rolfe* v. *Perry*, 3 D. J. & S. 481; 32 L. J. Ch. 471; 8 L. T. 441. Where of two estates comprised in the same mortgage, the testator devised one specifically, and left the other to pass by a residuary devise, this is not enough to show a contrary intention, but both must bear the mortgage rateably, *Gibbons* v. *Eyden*, L. R. 7 Eq. 371; 38 L. J. Ch. 377; 20 L. T. 516; *Sackville* v. *Smyth*, L. R. 17 Eq. 153; 43 L. J. Ch. 494; *In re Smith*, 33 Ch. D. 195; 53 L. J. Ch. 914; 55 L. T. 549; dissenting from *Brownson* v. *Lawrance*, L. R. 6 Eq. 1; 37 L. J. Ch. 351; 18 L. T. 143. In *Greated* v. *Greated*, 26 Be. 621, where a gift of residue was in these terms: "The rest and residue of my real and personal estate, after paying my mortgage and other debts and funeral expenses, I leave, &c.," it was held that this was a sufficient indication of intention that the mortgage debts were to be paid from another source than the mortgaged estate.

Where real estate which is subject to a mortgage is specifically devised, and the will contains a direction that the mortgage shall be paid off out of the proceeds of sale of other realty, and these prove insufficient, the mortgaged property is only exonerated to the extent of the substituted property and remains charged with the balance of the debt under the Acts of 1854 and 1867, the "contrary or other intention" manifested by

**Notes to Prec. 16.**

the direction only excluding the Acts so far as the substituted property is sufficient, *In re Birch*, '09, 1 Ch. 787; 78 L. J. Ch. 385; 101 L. T. 101.

A large number of cases arose under the principal Act (17 & 18 Vict. c. 113) as to the effect of directions by testators, in more or less general terms, for the payment of "debts" out of their personal estate, or out of some portion of their real or personal estate other than the property mortgaged. Having regard to the fact that the amending Act (30 & 31 Vict. c. 69) has now been in force for thirty years, it is not considered desirable to discuss these decisions in the present edition. All the cases decided previously to *Eno* v. *Tatham*, 3 D. J. & S. 443; 32 L. J. Ch. 311; 8 L. T. 127, will be found referred to in the report of that case. In that case, a testator, by his will dated in 1857, appointed his wife to be his executrix, and gave her all his personal estate subject to the payment of his debts, funeral and testamentary expenses; and he devised his real estate to trustees, who were to let the estate and pay the rents, after deducting repairs and insurance, to his wife for life. On her death they were to sell and apply the proceeds, after deducting their costs and expenses, for the benefit of the testator's brothers and sisters and nephews and nieces. The testator's real estate was to be subject to a mortgage created by himself before the date of his will. *Held*, that the testator's intention was plain, that his mortgage debt was to be paid as a debt out of his personal estate, and that the mortgaged estate was not primarily liable to the payment of it under the provisions of the principal Act. And see *Rodhouse* v. *Mold*, 35 L. J. Ch. 67; 12 L. T. 629; *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407; 16 L. T. 660.

By 30 & 31 Vict. c. 69, it is enacted that in the construction of the will of any person who may die after 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of intention contrary to, or other than, the rule established by Locke King's Act, unless such contrary or other intention shall be fully declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. The meaning of which appears to be this—that if a testator wishes to exclude the rule laid down by Locke King's Act, he must give a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them, *Nelson* v. *Page*, L. R. 7 Eq. 25; 38 L. J. Ch. 138; 19 L. T. 447; and the effect is to overrule *Eno* v. *Tatham* as to the wills of testators dying after 1867, *Lewis* v. *Lewis*, L. R. 13 Eq. 218; 41 L. J. Ch. 195; 25 L. T. 555. In *Elliott* v. *Dearsley*, 16 Ch. D. 322; 44 L. T. 198, a direction to pay debts out of a mixed fund arising from both real and personal estate was held not sufficient evidence of contrary intention to exclude the operation of the Act. See also *In re Valpy*, '06, 1 Ch. 531; 75 L. J. Ch. 301; 94 L. T. 472.

In *In re Fleck*, 37 Ch. D. 677; 57 L. J. Ch. 943; 58 L. T. 624, a testator directed his private debts to be paid out of the proceeds of certain

**Notes to Prec. 16.**

life policies; he bequeathed the residue of his personal estate subject to the payment of his trade debts; after the date of his will he deposited the title deeds of real estate with his bankers to secure an overdrawn trade account. It was held that the devisee of the real estate was entitled to have it exonerated from the banker's lien, and to have the bank debt thrown upon the residuary personalty which was charged with payment of trade debts. The headnote to this case, 37 Ch. D. 677, is inaccurate. In *In re Trevelyan*, 26 Sol. Journ. 43, a testator, after reciting that an estate, called the Wallington Estate, was subject to two mortgages for 25,000*l.* and 12,000*l.*, declared that the Wallington Estate should be exclusively charged with the two mortgages in exoneration of his personal estate. The testator subsequently made a gift of the residue of his estate after payment of his debts other than those for which he had previously made provision. There was another mortgage of 18,000*l.* upon the Wallington Estate. Chitty, J., held that the will sufficiently showed a "contrary intention," and that this 18,000*l.* mortgage was payable out of the residuary personalty in exoneration of the Wallington Estate. See also *In re Nevill*, 59 L. J. Ch. 511; 32 L. T. 864, where a testator had made provision for payment of his "trade debts" and "private debts" in such a manner as in the opinion of the Court to manifest a "contrary intention." *In re Nevill* was considered and followed in *Thompson* v. *Bell*, '03, 1 Ir. R. 489. In *In re Newmarch*, 9 Ch. D. 12; 48 L. J. Ch. 28; 39 L. T. 146, it was held that a charge of debts on part of testator's real estates in exoneration of the rest without specially referring to his mortgage debts, is not a sufficient expression of a "contrary intention" to exonerate the mortgaged estate. And now, as we have already seen (*ante*, p. 289), by 40 & 41 Vict. c. 34, "such contrary intention shall not be deemed to be signified by a charge of, or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate."

A direction by a testator to his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate," will not suffice to exonerate mortgaged real estate from primary liability to discharge the mortgage debt, *In re Rossiter*, 13 Ch. D. 355; 49 L. J. Ch. 36; 42 L. T. 353. A "contrary intention" was held to be signified in *Re Campbell*, '93, 2 Ch. 206; 62 L. J. Ch. 594; 68 L. T. 851.

The Acts have been held by Kekewich, J., to apply where land which had been delivered in execution, under a writ of *elegit*, to judgment creditors of a testator, was specifically devised by the subsequent will of the testator, with the result that the devisee was not entitled to have the land exonerated by the personal estate, *In re Anthony*, '92, 1 Ch. 450; 61 L. J. Ch. 434; 66 L. T. 181.

See further, as to the exoneration of mortgaged estates, the notes to *Duke of Ancaster* v. *Mayer*, 1 Br. C. 454, in 1 Wh. and Tud. L. C. Eq.; 2 Jarm. Wills, Ch. XLVI.; Williams, Real Assets, 37, 134; Hawkins, Constr. Wills, 278; 4 Dav. Conv. 249.

(*b*) See note (*b*), Prec. IV.

**Notes to Prec. 16.**

(*c*) Clauses of accruer should be so framed that the shares of objects dying may go not merely to survivors properly so called, but to the others of the devisees or legatees, thereby conferring on predeceased devisees or legatees (dying under circumstances which do not subject their shares to the devesting operation of the clause in question) disposable and transmissible interests. In fact, under a clause of accruer, correctly framed, each object, living the rest, and during the suspense of the absolute vesting of their shares, has a present disposable interest in such shares, every one of which is *ab initio* limited to him by way of executory devise or bequest. Cross-remainders stand upon the same principle. (Compare note (*a*) to Prec. XI.)

Suggestions respecting clauses of accruer.

Clauses of accruer

By way of illustration:—Suppose real or personal estate to be given by will equally among A., B., and C., with a gift over of the shares of any of them dying under the age of twenty-one years to the survivors or survivor; A. attains twenty-one and then dies; afterwards B. dies under twenty-one. Would the share of B. be divided between C. and the representatives of A., or go exclusively to C.? If the words "survivors" or "survivor" were construed literally, the share in question would belong wholly to C.; if construed "others or other," the representatives of A. would participate. It seems that the strict construction generally prevails, *Crowder* v. *Stone*, 3 Rus. 217; 27 R. R. 68; *Milsom* v. *Awdry*, 5 Ves. 465; 5 R. R. 102; *Ranelagh* v. *Ranelagh*, 2 M. & K. 441; 39 R. R. 233; *Cromek* v. *Lumb*, 3 Y. & C. Ex. 565; *Leeming* v. *Sherratt*, 2 Ha. 14; 62 R. R. 1; *Willetts* v. *Willetts*, 7 Ha. 38; 17 L. J. Ch. 457; 82 R. R. 6; *Greenwood* v. *Percy*, 26 Be. 572; *Re Corbett's Trusts*, Joh. 591; 29 L. J. Ch. 458; *De Garagnol* v. *Liardet*, 32 Be. 608; *King* v. *Frost*, 15 App. Cas. 548; 63 L. T. 422; and that, in order to warrant the translation of "survivor" into "other," there must be an explanatory context. See *Harrison* v. *Harrison*, '01, 2 Ch. 136; 70 L. J. Ch. 551; 85 L. T. 39; *Inderwick* v. *Tatchell*, '03, A. C. 120; 72 L. J. Ch. 393; 88 L. T. 399; *Olphert* v. *Olphert*, '03, 1 Ir. R. 326. On the other hand, the latter construction has certainly prevailed in a few cases, even where it was unaided by the context, *Aiton* v. *Brooks*, 7 Sim. 204; 40 R. R. 110; *Cole* v. *Sewell*, 2 H. L. C. 186. In the former case, Sir L. Shadwell, V.-C., E., seemed to consider the strict interpretation to apply only where the gift was to survivors simply and absolutely, and that the more liberal construction might be adopted where such gift was to take effect on a contingency; but this distinction does not reconcile the authorities; as, in many of the cases in which "survivor" has been construed strictly, the gift was dependent on some collateral event.

—should be extended to *others* as well as survivors.

A testator devised his real estate in thirds to his three daughters for life, with remainder to their children in tail, with cross remainders to the survivors and others of the children; and in case one or more of his daughters should die without issue, then the testator gave her or their share or shares to the survivors or survivor for life, with remainder to

"Survivor," when construed "other."

**Notes to Prec. 16.**

the children of such survivors or survivor in tail. Sir J. Leach, M.R., held that the word "survivor" in the latter instances was not to be extended to "other," because survivors were to take as tenants in common for life, which was inconsistent with the notion that the testator meant that the children of a deceased daughter should stand in the place of their parent, *Winterton* v. *Crawford*, 1 R. & M. 407. His Honour's reasoning would have been conclusive if the only estates created by the ulterior devise were for life (in which case indeed the point could not arise); but, inasmuch as remainders in tail to the children were appended to such estates for life, why might not the clause in question be construed as applying with respect to surviving children, to both estates for life and the remainders; and, with respect to the deceased children, to the remainders only, *referendo singula singulis?* See *Holland* v. *Allsopp*, 29 Be. 498; *Re Keep's Will*, 32 Be. 122. It is clear, however, that although the word "survivor" must now be regarded as one which, when unexplained, ought, like all others, to retain its strict and proper signification, *Re Usticke*, 35 Be 338; yet it will yield up its primary sense on a manifestation of intention in the context to use the term in the sense of "other," *Wilmot* v. *Wilmot*, 8 Ves. 10; 6 R. R. 196; *Davidson* v. *Dallas*, 14 Ves. 576; 9 R. R. 350; *Barlow* v. *Salter*, 17 Ves. 479; *Smith* v. *Osborne*, 6 H. L. C. 375; *Re Tharp's Estate*, 1 D. J. & S. 453; 33 L. J. Ch. 59; 8 L. T. 559; *Hurry* v. *Morgan*, L. R. 3 Eq. 152; 36 L. J. Ch. 105; *Cross* v. *Maltby*, L. R. 20 Eq. 378; 33 L. T. 300; *Lucena* v. *Lucena*, 7 Ch. D. 255; 47 L. J. Ch. 203; 37 L. T. 420; *In re Johnson*, 53 L. J. Ch. 1116. Thus, if there is a gift in equal shares to A., B., and C. as tenants for life, and after the decease of any of them to pay the principal of the share of the person so dying among his children, and there is a gift over on the death of all the tenants for life without leaving children, the children of a tenant for life will participate in the share of another tenant for life who died without issue after their parent, *Waite* v. *Littlewood*, L. R. 8 Ch. 70; 42 L. J. Ch. 216; 28 L. T. 123; *Wake* v. *Varah*, 2 Ch. D. 348; 45 L. J. Ch. 533; 34 L. T. 437; *Badger* v. *Gregory*, L. R. 8 Eq. 78; 21 L. T. 137; *In re Bilham*, '01, 2 Ch. 169; 70 L. J. Ch. 518; 84 L. T. 499. But if there is no gift over, and the share of the tenant for life dying without issue is given to the survivors for their respective lives, and after their deaths to their children, only children of the survivors will take, and children of a tenant for life who died previously will be excluded, *In re Horner's Estate*, 19 Ch. D. 186; 51 L. J. Ch. 43; 45 L. T. 670; *In re Benn*, 29 Ch. D. 839; 53 L. T. 240. It was held in *Hodge* v. *Foot*, 34 Be. 349, that where there was no general gift over on failure of issue of all the tenants for life, but the share of any one dying without issue was given to the survivors and their children *per stirpes*, in the same manner as their original shares, the children of one who had predeceased were entitled, and this was followed in *In re Walker's Estate*, 12 Ch. D. 205; 48 L. J. Ch. 598; *In re Bowman*, 41 Ch. D. 525; 60 L. T. 888.

**Notes to Prec. 16.**

"Survivor," meaning "longest liver."

As to "survivor" being construed to mean "longest liver," see *Maden* v. *Taylor*, 45 L. J. Ch. 569; *Davidson* v. *Kimpton*, 18 Ch. D. 213; 45 L. T. 132; *In re Mortimer*, 54 L. J. Ch. 414; 52 L. T. 383; *Askew* v. *Askew*, 57 L. J. Ch. 629; 58 L. T. 472; *In re Roper's Estate*, 41 Ch. D. 409; 58 L. J. Ch. 439; 61 L. T. 42. For the construction of a gift to "survivors and others," see *Slade* v. *Parr*, 7 Jur. 102; and to "other surviving," see *Re Arnold's Trusts*, L. R. 10 Eq. 252; 39 L. J. Ch. 875; 23 L. T. 337. The preceding long range of cases on this much-debated point strongly evinces the expediency of preventing its occurrence by an express gift to the others, omitting survivors.

Accruing shares to be subjected to the operation of clauses of accruer.

Another caution to be observed in regard to the clauses under consideration is to make them expressly embrace the accruing as well as the original shares; otherwise their operation is confined to the original shares, see Hawkins, Constr. Wills, 268. Thus, if real or personal estate is given to A., B., and C., and it is provided that, in case of the death of any of them under the age of twenty-one years, their or his shares or share shall go to the others or other of them: A. dies under twenty-one, by which event his share devolves to B. and C. in moieties; if this is followed by the death of B. who dies under twenty-one, it is clear that, in the absence of a context evincing a contrary intention, the moiety which B. derived under the clause in question of A.'s share does not go over to C. along with B.'s original share, but is transmissible to the representatives of B., as having vested in B. unaffected by the cross executory gift, *Woodward* v. *Glasbrook*, 2 Ver. 388; *Ex parte West*, 1 Br. C. 575; *Crowder* v. *Stone*, 3 Rus. 217; 27 R. R. 68; *Bright* v. *Rowe*, 3 M. & K. 316; 41 R. R. 75; *Gibbons* v. *Langdon*, 6 Sim. 260; 38 R. R. 109; *Macgregor* v. *Macgregor*, 2 Col. 192; *Barker* v. *Lea*, T. & R. 413; 24 R. R. 85; the rule, however (which generally contradicts the intention of the testator), may be excluded by the context showing a clear intention to the contrary, *Eyre* v. *Marsden*, 2 Ke. 564; 7 L. J. Ch. 220; *Leeming* v. *Sherratt*, 2 Ha. 14; 11 L. J. Ch. 423; *Goodman* v. *Goodman*, 1 De G. & S. 695; 17 L. J. Ch. 103; 75 R. R. 252; or by showing a clear intention that the fund in question is an "aggregate fund" designed to be kept together, *Worlidge* v. *Churchill*, 3 Br. C. 465; *Douglas* v. *Andrews*, 14 Be. 347; 92 R. R. 133; *Dutton* v. *Crowdy*, 33 Be. 272; 33 L. J. Ch. 241; 9 L. T. 630. And see *Re Jarman's Trusts*, L. R. 1 Eq. 71, as to separate use attaching to accrued as well as original shares.

To what period survivorship refers.

Obscurity as to the period to which survivorship refers, especially where the nature of the devise is such as to present a point of time other than the death of the testator to which it may by possibility be construed as referring, has produced numerous and conflicting decisions. In the case, for instance, of a gift "to A. for life, and after his decease to B., C., and D., as tenants in common, and the survivors and survivor of them, their or his heirs and assigns," if either of the remaindermen dies in A.'s lifetime, the question necessarily arises whether the testator means survivors at his own death or at the death of the tenant for life.

Real estate.

In regard to real estate, the older decisions seem generally to make the

**Notes to Prec. 16.**

death of the testator the period of ascertaining the objects, *Wilson* v. *Bayly*, 3 Br. P. 195; *Rose* v. *Hill*, 3 Bur. 1881; *Garland* v. *Thomas*, 1 B. & P. N. R. 82; *Edwards* v. *Symons*, 6 Tau. 213; 16 R. R. 603; and in one of such cases this doctrine was applied even to a devise to a class, *Doe* v. *Prigg*, 8 B. & C. 231; but see *Wordsworth* v. *Wood*, 1 H. L. C. 129; 48 R. R. 191; but in respect of real estate the law on this point long remained unsettled, *Taaffe* v. *Conmee*, 10 H. L. C. 64; 6 L. T. 666. In the latter case of *Re Gregson's Trusts*, 2 D. J. & S. 428; 34 L. J. Ch. 41; 11 L. T. 460, it was held that the rule laid down in *Cripps* v. *Wolcott*, 4 Mad. 11; 20 R. R. 268, applies to real as well as personal estate.

Personal estate.

*Cripps* v. *Wolcott* decided that if there is no previous interest given in the legacy, then the time at which survivorship is to be ascertained is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate is given, then the time at which survivorship is to be ascertained is the death of the tenant for life, and the survivors at such death will take the whole legacy, thus making the time for ascertaining survivorship correspond with the period of division of the fund. See also *Browne* v. *Lord Kenyon*, 3 Mad. 410; 18 R. R. 261; *Pope* v. *Whitcombe*, 3 Rus. 124; 27 R. R. 32; *Hearn* v. *Baker*, 2 K. & J. 383; *Nevill* v. *Boddam*, 28 Be. 554; 29 L. J. Ch. 738; *Thompson* v. *Thompson*, 29 Be. 654; *Young* v. *Robertson*, 4 Macq. 314; *Marriott* v. *Abell*, L. R. 7 Eq. 478; 38 L. J. Ch. 451; 20 L. T. 690; and where there are successive tenants for life, the period of division is the death of the last living tenant for life, *Howard* v. *Collins*, L. R. 5 Eq. 349; and even in some earlier cases, the circumstance of the subject of gift not being *in esse*, until the decease of the tenant for life (as where the gift is of the produce of real estate to be converted at that period), was thought to favour the same construction, *Brograve* v. *Winder*, 2 Ves. 634; 20 R. R. 261; *Newton* v. *Ayscough*, 19 Ves. 534; *Hoghton* v. *Whitgreave*, 1 J. & W. 146; 20 R. R. 259; and such was also the effect of there being in the same will an express gift to survivors at that period, *Daniell* v. *Daniell*, 6 Ves. 297; 5 R. R. 308; and see *Haws* v. *Haws*, 3 Atk. 524. But if the gift is immediate, *i.e.* to take effect in possession at the death of the testator, the words in question are from necessity referred to his death, *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96; *Smith* v. *Horlock*, 7 Tau. 129. It seems that where the language of the will admits of survivorship being referred either to the time of distribution or to the attainment by the legatees of majority, the Courts will incline to the latter construction, in order that the legatees who have attained the prescribed age may not be deprived of their legacies by their subsequent decease before the time of distribution. *Bayard* v. *Smith*, 14 Ves. 470; *Hallifax* v. *Wilson*, 16 Ves. 168; 10 R. R. 146; *Crozier* v. *Fisher*, 4 Rus. 398; 28 R. R. 141; see also *Jones* v. *Jones*, 13 Sim. 561; 60 R. R. 402; *Bright* v. *Rowe*, 3 M. & K. 316; 41 R. R. 75; *Butterworth* v. *Harvey*, 9 Be. 130; 73 R. R. 303. For a gift to A. for life and after his death to his children, to be divided at twenty-one "with benefit of survivorship," see *Corneck* v. *Wadman*, L. R. 7 Eq. 80.

## No. XVII.

WILL *of a* MARRIED MAN, *providing for a Wife and for Adult and Infant Children.—Devise to Wife during Widowhood of Freehold Dwelling-house, with the Use of the Furniture, &c.—Devise of other Freehold Property to Two Sons in common in Fee, subject to a Charge in aid of the Personal Estate.—Devise of other Freehold Property, upon trusts in favour of a Married Daughter, for Life inalienably, and her Issue, and ultimately upon the Trusts declared of the residuary Real Estate.—Residue of Real and Personal Estate vested in Trustees for Conversion into Money, with discretionary Power to postpone Conversion, and Direction as to Unconverted Estate; Produce, subject to a Provision for Wife by way of Annuity (reducible on Marriage), given to Children equally; each Child's Share strictly settled on such Child for Life inalienably, and on his or her Issue, with Power of appointing a Life Interest to a Husband or Wife.—Provisions for Advancement, &c., with an ultimate Limitation over in favour of the other Children and their Issue, &c.—Power to appoint Trustees.—Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I BEQUEATH to my wife [*name*] absolutely all the wines liquors fuel and other consumable stores and provisions which shall belong to me at my decease Wines, &c., to wife.

I DEVISE the freehold messuage with the offices gardens and appurtenances belonging thereto at —— aforesaid now in my own occupation together with the use and enjoyment therein of the furniture (*a*) pictures prints musical instruments plate linen china glass and other household effects not hereinbefore bequeathed which shall be in or about the same at my death Devise of freehold house, with use of furniture, &c., to wife during widowhood.

**Prec. 17.** to my wife [*name*] during her life if she shall continue my widow she insuring and keeping the same insured against loss by fire to the full value [*or* to three-fourths of the value] in the names of my trustees and also keeping the same in good repair and condition reasonable wear and tear excepted

Inventory of furniture, &c., to be taken.

And I direct that my executors shall cause an inventory to be taken of the chattels comprised in the preceding bequest and two copies to be made thereof and signed by my wife and my executors before the delivery of such chattels to her one of such copies to be delivered to her and the other to be kept by them I devise my warehouse adjoining my dwelling-house and my four cottages now in the several occupations of [*names*] all which hereditaments are situate at —— aforesaid also the said freehold messuage or dwelling-house now in my own occupation with the offices gardens and appurtenances thereunto belonging (but subject as to the last-mentioned messuage and premises to the estate of my wife therein under the devise hereinbefore contained) Unto my sons [*name*] and [*name*] as tenants in common in equal shares in fee simple nevertheless subject to and charged with the payment by my said sons respectively in equal proportions within —— calendar months next after my decease unto my executors of the sum of £—— sterling with interest for the same after the rate of four per centum per annum from my death to be applied as part of my personal estate hereinafter bequeathed I devise my freehold messuages with the outbuildings and gardens thereunto belonging and the closes of land held therewith situate at —— now in the occupation of [*names*] Unto and to the use of [*names*] their executors and administrators during the life of my daughter [*name*] the wife of [*name*] and in case she shall exercise the power hereinafter given to her to appoint such rents and profits to any husband of hers then also during the life of such husband upon the trusts following (namely) Upon trust to pay the rents and profits thereof as and when the same shall become due and not by way of anticipation for her separate use into the hands of my said daughter during her life And I empower my said daughter by her will to appoint to or in favour of her present or any future husband my last-mentioned hereditaments or

Devise of freehold estates to two sons in common in fee, charged with a sum of money to be paid to executors in aid of the personal estate.

Devise of other freehold estates to trustees, for the life of a married daughter, on special trusts for her separate and inalienable use;

—with power for her to appoint a life interest to any husband;

Prec. 17.

any part thereof for his life or for any estate or interest determinable on or before his death [*or* I empower my said daughter by any deed or deeds with or without power of revocation and new appointment or by her will to limit the said hereditaments or any part thereof to any husband whom she shall have married or shall actually marry for his life in remainder expectant upon the death of my said daughter or for any less estate or interest] AND after the death of my said daughter subject to any appointment in favour of a husband to be made by her as aforesaid I DEVISE the same hereditaments TO SUCH USE or uses for such estates and in such manner for the benefit of all or any one or more of the children and other issue of my said daughter (such other issue to be born in her lifetime) as she by any deed or deeds with or without power of revocation and new appointment or by her will shall appoint And in default of appointment To THE USE of her child if only one or of her children in equal shares if more than one in fee simple with cross executory limitations of the shares original and accruing of each of the same children in the event of his or her dying under the age of twenty-one years without having married To the use of the others in equal shares and the other in fee simple With a limitation over of the entirety in the event of there not being any child of my same daughter or not any such child who shall attain the said age or marry To THE USE of my trustees to be disposed of as part of the residue of my real estate hereinafter devised according to the then subsisting trusts of such residue I DECLARE that the respective devisees of my real estates hereinbefore specifically devised shall be entitled to the whole of the rents accruing due at my death without any apportionment of such rents in favour of my executors I DEVISE all the real estate not hereinbefore devised to which I shall be entitled or over which I shall have any disposing power at my death and I BEQUEATH the residue of the personal estate to which I shall be then entitled (including the furniture and effects whereof the use and enjoyment are hereinbefore given to my wife subject to her interest therein under such gift) UNTO my trustees UPON TRUST to sell my said real estate and so

[another form;]

—to her children, as she shall appoint;

—to her children in common in fee, with cross executory limitations;

—to trustees in fee, upon the trusts after declared of the residuary real estate.

Residue of real and personal estate to trustees;

—to sell and convert;

**Prec. 17.**

—to invest surplus, after paying debts, &c.

much of my said residuary personal estate as shall be of a saleable nature (*b*) and to get in the rest of my residuary personal estate and to dispose of the net moneys to arise from such real estate and residuary personal estate after payment thereout of my debts and my funeral and testamentary expenses and the expenses incident to the execution of the preceding trust according to the trusts hereinafter declared concerning the same Nevertheless I give to my trustees discretionary authority to postpone the sale of all or any part of my residuary real estate and the getting in of such parts of my residuary personal estate as shall consist of stock funds shares or securities of any description whatever for such period as to them shall seem expedient [*or* until some person beneficially entitled in possession to a share of the trust premises shall in writing require the sale and getting in thereof] and also to let from year to year or for any term not exceeding [*seven*] years in possession at the best rent and to manage at their discretion the unsold real estate But I declare that from the time of my decease the unsold real estate and outstanding personal estate shall be subject to the trusts hereinafter declared concerning the said net moneys and the rents interest and yearly produce thereof shall be deemed annual income for the purposes of such trusts and such real estate shall be transmissible as personal estate and be considered as converted in equity I DIRECT my trustees to stand possessed of the net moneys to arise as aforesaid UPON TRUST thereout in the first place to pay unto my wife an annuity of £—— during her life by equal quarterly payments the first of such payments to be made at the expiration of three calendar months from my death But I direct that in the event of my wife marrying again the said annuity of £—— shall be reduced to an annuity of £—— such reduced annuity to be payable quarterly and the first reduced payment to be made on the quarterly day of payment which shall happen next after the marriage of my widow AND I EMPOWER my trustees if they shall think fit out of the same trust-moneys to appropriate and invest upon some suitable authorised investment a sum sufficient at the period of appropriation as a fund for answering the said annuity to my wife And I declare that

Discretionary power to postpone the sale and conversion;

—the unconverted estate to be subject to the trusts declared of the produce.

Trusts of the residuary funds;

—to pay annuity to wife for life,

reducible on her marrying again.

Fund to be set apart for answering the annuity in exoneration of the general fund;

Prec. 17.

from and after such appropriation the residue of the same trust-moneys shall be liberated from the trust for payment of the said annuity but the appropriated fund shall (without prejudice to the said annuity) be subject to the trusts hereinafter declared concerning the same trust-moneys And subject to the trust aforesaid UPON TRUST to divide the same trust-moneys among all my children in equal shares But subject to the trusts following (namely) As to the yearly income of the share of each son accruing due in his lifetime UPON TRUST to pay to him such yearly income until by his act or default or by operation of law such income or some part thereof would but for this provision become payable to some other person or persons whereby he would be deprived of the personal enjoyment thereof and thereupon UPON TRUST to apply such yearly income for the benefit of his wife children and other issue for the time being in existence or some one or more of those objects if any or if none of the persons or some one or more of the persons who if the trusts powers and provisions hereinafter contained concerning the same share in favour of his wife children and issue had failed of effect would be entitled to the same income in such proportions at such times and in such manner as my trustees shall in their discretion think fit And as to the yearly income of the share of each daughter accruing due in her lifetime UPON TRUST to pay the same yearly income as and when the same shall become due and not by way of anticipation into her own hands until by her act or default or by operation of law such income or some part thereof would but for this provision become payable to some other person or persons whereby she would be deprived of the personal enjoyment thereof and thereupon UPON TRUST to apply such yearly income for the benefit of all or some or one of her children and other issue for the time being in existence if any or if none of the persons or some or one of the persons who if the trusts powers and provisions hereinafter contained concerning the same share in favour of her husband children and issue had failed of effect would be entitled to the same yearly income in such proportions at such times and in such manner as my trustees shall think fit And as to the capital of the share of each child of

—to divide the fund among children equally;

trusts of the share of each son;

—inalienable life interest strictly guarded;

trusts of the share of each daughter;

—inalienable life interest;

**Prec. 17.**

—children and issue, as parent shall by deed or will appoint;

—children equally, with benefit of accruer;

—testator's other children equally.

Power for child to appoint a life interest to a husband or wife.

Advancement of grandchildren and remoter issue.

Advancement of testator's children;

mine and the yearly income thereof to accrue due after his or her decease UPON SUCH TRUSTS for the benefit of all or any one or more of the children and other issue of my same child (such other issue to be born in his or her lifetime) as my same child by any deed or deeds with or without power of revocation and new appointment or by his or her will shall appoint And in default of such appointment IN TRUST for my grandchild if only one or my grandchildren equally if more than one issue of my same child but on the death of each grandchild who being a son shall die under the age of twenty-one years or being a daughter shall die under that age without having been married as well the share originally given as the shares accruing under this cross executory trust to such grandchild shall accrue to the other grandchildren equally or to the other grandchild but no grandchild in whose favour an appointment shall be made under the power last aforesaid shall participate in the unappointed fund without bringing the appointed interest into hotchpot And if no grandchild being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then IN TRUST for my other children in equal shares AND I EMPOWER each child of mine by his or her will to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share for the life of such wife or husband or for any interest determinable on or before the death of such wife or husband AND I EMPOWER my trustees to apply for the advancement or otherwise for the benefit of each grandchild or remoter issue any part or parts not exceeding in the whole one-half of the capital of the share to which such grandchild or remoter issue shall be entitled either in possession or in reversion immediately expectant on a prior life interest but no such application of a reversionary share shall be made without the previous consent in writing of the person on whose death such prior interest shall be determinable AND I EMPOWER my trustees notwithstanding the trusts hereinbefore declared of the share of each child of mine to apply at any period or periods of the life of each such child for his or her advancement or otherwise for his or her benefit any part or parts not exceeding in the whole

**Prec. 17.**

one-half of the capital of his or her share AND I DECLARE that the advancement clauses hereinbefore contained shall apply as well to accruing as to original shares and that such clauses so far as they relate to grandchildren and remoter issue shall be subject in respect of shares taken under any exercise of the power of appointing to grandchildren and remoter issue hereinbefore contained to the same power I DIRECT my trustees to invest the share of each child of mine in the names of my trustees in some authorised trust investment (*c*) but while any trust of the income of such share shall be subsisting for the life of such child or of his or her wife or husband the statutory power to vary investments shall not be exercised without the previous consent in writing of the person on whose death such trust shall be determinable unless such person shall be an infant [*or* but during the life of such child being adult the statutory power to vary investments shall not be exercised without his or her previous consent in writing] AND I SUBJECT the share or shares which under the ultimate trusts hereinbefore declared concerning the original share of each of my children each or any other child of mine shall eventually take to all the trusts and provisions herein contained concerning the original share of such other child inclusively of this clause I DECLARE that if any child of mine shall die in my lifetime and any issue of such child shall be living at my death then the shares as well accruing as original to which the child so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my death I DECLARE that it shall be lawful for such child or children of mine as shall for the time being be living and of the age of twenty-one years or the major part of such children if any and if there shall not be any such child then for my wife during her widowhood and after her death or second marriage for my executors or executor or administrators or administrator for the time being to appoint new trustees of my will AND I FURTHER DECLARE that the clauses hereinbefore contained naming or referring to "my trustees" shall extend and be applied to the trustees or

—extended to accruing shares, and subjected to the power of appointing among issue.

Direction as to investment of children's shares.

Shares accruing subjected to trusts of original shares.

Substitution of grandchildren for children of testator predeceasing him.

Power to appoint new trustees.

Powers extended to trustees for the time being.

**Prec. 17.** trustee for the time being of my will I APPOINT my wife during her widowhood and the said [*names*] to be executors of my will and guardians of my infant daughter LASTLY I REVOKE all former wills and codicils declaring this writing alone to express the whole of my will IN WITNESS &c.

Appointment of executors and guardians.

**NOTES to Precedent XVII.**

(*a*) See note (*b*), Prec. XV.

(*b*) Sect. 35 of the Conveyancing Act, 1881, confers on trustees for sale all the powers as to manner of sale, conditions as to title, rescission, &c., which formerly used to be inserted in wills and settlements.

(*c*) See note (*b*), Prec. IV.

## No. XVIII.

WILL *of a* MARRIED MAN *disposing of Real and Personal Estate in favour of his Wife and Children.—Devise of Part of the Real Estate to Testator's Children in Fee; of other Part to a married Daughter and her Husband successively for Life, and her Children in Fee; of other Part to a Son and his Wife successively for Life, and their Children in Fee; of other part to a Son for life, then to his Sons successively in Fee, by way of Executory Devise, with a Limitation over to his Daughters; of other Part to Testator's Wife during Widowhood, then to Trustees for Sale, with Power to concur with the wife in a Sale.—Devise of Residue of Freehold and Leasehold Estate to Trustees for Sale.—Copyhold Estates are subjected to the same Dispositions, with Power for Trustees to appoint the same to Purchasers.—Permission to Wife to occupy Dwelling-house, &c., during Widowhood; Specific and Pecuniary Bequests to Wife.—Bequests of Residuary Personal Estate to Trustees to be converted with particular Powers and Provisions applicable to Contingent and Reversionary Property, Annuities and other determinable Investments.—Produce of Residuary Real and Personal Estate to be invested, and Income paid to Wife during Widowhood; Capital to Children equally to vest as to sons at Twenty-one and as to daughters at Twenty-one or Marriage.—Ultimate Trust (subject, as to Part, to Wife's Appointment) for Testator's Brothers and Sisters, and their Issue per Stirpes.—Provision for letting in the Families of Testator's Children dying in his Lifetime.—Settlement of Daughter's Shares upon them and their Issue, but so as to postpone, as far as may be, the Vesting till Twenty-five; with a special Provision for their Protection, and a Power*

**Prec. 18.**

*to appoint Life Interests to Husbands.—Provision for Advancement of Infant Legatees generally.—Annuity to Wife marrying again.—Power to appoint Trustees. —Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I DEVISE all the freehold hereditaments in the parish of —— in the county of —— to which I am entitled at the date of this my will To my eldest son [*name*] in fee simple I DEVISE my freehold closes called —— containing respectively —— or thereabouts situate at —— to my wife [*name*] for her life without impeachment of waste With remainder to my sons and daughters [*names*] in equal shares as tenants in common in fee simple with cross executory limitations of the shares original and accruing of such of them as shall die under the age of twenty-one years without having married [*or* without leaving issue] to the others in equal shares as tenants in common or to the other of them in fee simple And I limit the shares original and accruing of each daughter to my executors and administrators for her life without impeachment of waste Upon trust to pay the rents and profits thereof as and when the same shall become due and not by way of anticipation into her own hands to be enjoyed by her as an inalienable personal provision With remainder to such persons for such estates and in such manner as she shall by any testamentary writing appoint and in default of appointment to her in fee simple and I declare that if during the life of my same daughter the rents and profits of her share or shares or any part thereof shall from any cause whatever cease to be enjoyed by her as aforesaid then all the dispositions in her favour hereinbefore contained shall be void and the devise hereinbefore contained of the said freehold closes to my said sons and daughters shall thenceforth take effect in the same manner as if such daughter ceasing to enjoy the rents and profits of her share or shares had never existed as an object thereof I DEVISE the freehold messuage and lands which at the date of this my will constitute the farm called —— farm situate in the parish of —— in the county of —— to [*trustees*] their executors and administrators during the life of my daughter

Devise to testator's children in common in fee with cross executory devises.

Devise to trustees for the life of testator's married daughter,

**Prec. 18.**

[*name*] the wife of [*name*] without impeachment of waste Upon trust to pay the rents and profits thereof as and when the same shall become due and not by way of anticipation into her own hands to be enjoyed by her as an inalienable personal provision And I declare that if at any time during the life of my last-mentioned daughter the rents and profits of the same hereditaments or any part thereof shall from any cause whatever cease to be payable into her own hands to be enjoyed as aforesaid then the trust lastly hereinbefore contained in her favour shall thenceforth be void and the same rents and profits shall during the then remainder of her life be paid to the person or persons who would for the time being be entitled to receive the same if my same daughter were dead With remainder to her husband the said [*name*] for his life without impeachment of waste With remainder to the child if only one or the children if more than one of my last-mentioned daughter in fee simple such children if more than one to take as tenants in common in equal shares with cross executory limitations of the shares original and accruing of such of them as shall die under the age of twenty-one years without leaving issue to the other or others in fee simple and if more than one as tenants in common in equal shares And if there shall not be any child of my same daughter who shall attain the said age or shall die under that age and (*a*) leave issue living at his or her death Then to such persons for such estates and in such manner as my same daughter shall by any testamentary writing appoint And in default of appointment to my sons [*names*] in fee simple as tenants in common in equal shares

subject to cesser on alienation — to her husband for life —to her children attaining twenty-one, or dying under twenty-one, leaving issue, in fee— to sons of testator in common in fee.

I devise all my freehold hereditaments at —— in the county of —— which were purchased by me from [*name and description of vendor*] and were conveyed to me by indenture dated the —— day of —— 18— To my son [*name*] for his life without impeachment of waste With remainder to [*name*] the wife of my same son for her life without impeachment of waste With remainder to all or any one or more exclusively of the children and more remote issue of my same son (such issue coming into being in the lifetime of my same son and [*name*] his wife or the survivor of

Devise to testator's son for life— remainder to son's wife for life—to their issue, as they or the survivor shall appoint —to their children in fee, with cross executory devises;—to

**Prec. 18.**

the survivor of the son and his wife, in fee.

them) for such estate or estates in such shares subject to such limitations and in such manner in all respects as my same son and his said wife or the survivor of them by any deed or deeds with or without power of revocation and new appointment or as such survivor by any testamentary writing shall appoint And in default of appointment To the child if only one or the children if more than one of my same son in fee simple and if more than one to take as tenants in common in equal shares And if any of such children shall die under the age of twenty-one years without leaving issue living at his or her death or their respective deaths then as to as well the share hereinbefore limited to each child so dying as the share or shares limited to such child by this executory limitation to the other if only one or the others if more than one of the children of my same son in fee simple and if more than one to take as aforesaid And in case there shall not be any child of my same son or not any such child who shall attain the age of twenty-one years or die under that age and leave issue living at his or her death To the survivor of them my same son and his said wife in fee simple I DEVISE all the manors messuages lands and hereditaments in the county of —— to which I shall be entitled at my decease To my first son for his life With remainder to the first son of my first son in fee simple And if such first son of my first son shall die under the age of twenty-one years without leaving issue [male] living at his death To the second and every subsequent son of my first son successively according to seniority in fee simple so that the estate of such second and each subsequent son shall in the event of his death under the age of twenty-one years without leaving issue [male] living at his death be devested and go over to his next brother And if there shall not be any son of my first son or not any who shall attain the age of twenty-one years or die under that age and leave issue [male] living at his death then to the daughter or daughters of my first son in fee simple and if more than one as tenants in common in equal shares And if any of such daughters shall die under the age of twenty-one years without leaving issue living at her or their death or respective deaths then as to the share or

Devise to testator's first son for life—to the sons of such sons successively in fee, by way of executory devise to the daughters in common in fee—to testator's second and other sons, and their sons and daughters, in like manner.

**Prec. 18.**

shares original and accruing of the daughter or daughters so dying To the other or others of the daughters of my first son in fee simple and if more than one as tenants in common in equal shares And if there shall not be any daughter of my first son or not any such daughter who shall attain the age of twenty-one years or die under that age and leave issue living at her death To my second and every subsequent son for his life with remainders to his sons and daughters corresponding with the remainders hereinbefore limited to the sons and daughters of my first son but so that every elder of my second and subsequent sons and his sons and daughters shall be preferred to every younger of my same sons and his sons and daughters And if there shall not be any child of any of my sons or not any such child who shall attain the age of twenty-one years or die under that age and leave issue living at his or her death then to my own right heirs I DEVISE all the freehold hereditaments at —— in the county of —— which I lately purchased from the devisees in trust of [*name*] To my wife [*name*] during her life if she shall continue my widow without impeachment of waste And after her death or marrying again To [*names &c. of trustees*] in fee simple upon the trusts hereinafter contained concerning the residue of my freehold estates I DECLARE that the rents of the hereditaments hereinbefore specifically devised which shall be current or accruing at the time of my death shall not be apportioned (*h*) I DEVISE the residue of the freehold estates and all the leasehold estates to which I shall be entitled at my death unto the said [*trustees*] UPON TRUST to sell the same And I direct that the money to arise from the sale of my said estates shall be received by my trustees and after payment of my debts and funeral and testamentary expenses the residue thereof shall be disposed of in a manner hereinafter expressed I DECLARE that my trustees shall be at liberty to postpone the sale of my said estates or any of them until the produce shall become distributable under the trusts hereinafter contained or for any shorter period if such postponement shall appear to them to be advantageous and that during the suspense of the sale of my said estates or any of them my trustees shall have full power to let the same from year to

Devise to wife during widowhood—remainder to trustees, upon the trusts after declared of the other real estate.

Devise of freehold and leasehold estates to trustees, upon trust to sell.

Power to postpone the sale of the real estates, and in the meantime to let and manage, &c.

**Prec. 18.**

year or for any term not exceeding [*seven*] years in possession at the best rent or at their option to take possession thereof and manage and improve the same and for that purpose to employ agents bailiffs and servants and expend a competent part of my trust moneys and shall also have full power to cut and sell timber I DECLARE that the rents and profits of my estates from time to time remaining unsold shall be received by my trustees and be applied in the same manner as the income of the produce of such estates if sold would be applicable I DECLARE that notwithstanding the postponement of the sale of my said estates or any of them the same shall for the purposes of enjoyment and transmission be considered as converted in equity from the time of my death but without prejudice to the right of the person or persons becoming absolutely entitled to the entire produce thereof to treat the same as unconverted and requiring a conveyance thereof I WILL that my copyhold estates shall as far as the tenure thereof will permit be disposed of according to the trusts and declarations hereinbefore contained concerning my residuary freehold estates and for the greater convenience of performing such my will I DEVISE the same copyhold estates to such uses as my trustees shall by any deed or deeds to be executed within twenty-one years from my death appoint in order to complete any sale or sales to be made pursuant to my will (*r*) And in default of appointment To THE USE of the said [*trustees*] their heirs and assigns to be held upon and subject to the trusts and declarations aforesaid I DECLARE that notwithstanding the trust for sale hereinbefore contained my trustees shall permit my wife to have the use and occupation of the freehold messuage or dwelling-house with the offices gardens orchards pleasure-grounds and lands belonging thereto at —— aforesaid which at the date of this my will are in my own occupation (in exclusion of any hereditaments of mine which subsequently to that date may be occupied by me) as her residence so long as she shall think fit to reside therein and shall continue my widow she keeping the same insured against fire to the full value thereof [*or* to three-fourths of the value thereof] in the names of my trustees and also keeping the same in tenantable repair and paying the taxes

Trustees to receive the rents till sale.

Real estates till sold to be considered as personal.

Copyhold estates subjected to the same trusts, and devised to such uses as the trustees shall appoint, and in default of appointment, to them in fee.

Trustees to permit wife to reside in dwelling-house, during widowhood.

**Prec. 18.**

and other outgoings affecting the same And I direct that the trust for sale of the last-mentioned premises shall be suspended until the right of my said wife to the use and occupation thereof shall determine I give to my wife for her absolute use the carriage and carriage-horses with the harness and other appendages thereto respectively belonging of which I shall be possessed at my death also the implements and utensils stock of hay corn and straw and other movable effects which shall be used or employed in or about my coach-house and stables at my death also the gardening implements and utensils greenhouse and hothouse furniture pots plants in pots and other movable effects which shall be used or employed in or about my garden and pleasure-grounds at my death also the household furniture (*d*) books pictures prints china glass linen wine liquors fuel housekeeping stores and provisions and other movable effects of the like nature which shall belong to me at my death And I empower my trustees to decide conclusively in case of dispute what articles the last bequest shall be deemed to comprise I give to my wife the sum of £—— to be paid or retained out of the first moneys which shall be received from my estate I give all the plate which shall belong to me at my death unto the said [*trustees*] Upon trust to permit my wife so long as she shall continue my widow to have the personal use and enjoyment thereof And subject thereto In trust for such child or children of mine as shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married and if more than one to be divided between them in shares as nearly equal as may be by my trustees whose division shall be conclusive And I direct my trustees as soon as may be after my death and before the delivery to my wife of the said plate to cause an inventory thereof to be taken and two copies to be made of such inventory and to be signed by my trustees and my wife one copy to be kept by them and the other by her and my trustees shall after the signature of such copies and the delivery to my wife of the said plate be exempt from all responsibility in respect of such plate during her widowhood I bequeath the residue of the

Bequest to wife of various movables, with power to trustees to determine the extent of the bequest.

Pecuniary legacy to wife.

Bequest of plate upon trust to permit wife to have the use;

an inventory to be made.

Bequest of

**Prec. 18.**

residue of personal estate upon trust to convert.

Power to defer the sale of reversionary and contingent interests.

Power to continue determinable investments.

The actual yearly produce of the real and personal estate, whether more or less than the rule of equity allows, to be deemed income.

[*Or*, power to trustees to determine the rights of tenant for life and reversioner, in regard to

personal estate to which I shall be entitled at my death unto the said [*trustees*] UPON TRUST to sell convert collect and get in the same I DECLARE that if any real or personal estate hereinbefore directed to be sold or converted shall consist of reversionary future or contingent interests my trustees shall be at liberty in their discretion either to wait the falling in or the vesting of such interests or to sell the same or to concur with the person or persons entitled to the prior interest or interests in any arrangement for dividing the corpus of the property or for selling or converting the same and for apportioning the produce according to the value of the respective interests or otherwise providing for such interests I DECLARE that my trustees shall have full discretionary power to permit any part of my personal estate which shall at my death consist of life annuities or other determinable interests or of mortgages stocks funds shares in public companies or securities including personal securities or any other species of investment yielding interest or income to remain in the same state of investment for such period or periods as my trustees shall think fit I DECLARE that the actual yearly produce of my freehold leasehold and copyhold estates and of my residuary personal estate respectively until the sale and conversion thereof respectively shall be considered as the income thereof for the purposes of the trusts and provisions hereinafter contained and be applied accordingly whether the same shall be more or less in amount than the produce or value of the estates would have yielded if invested conformably to the trust for investment herein contained and so that nothing shall be placed on the one hand to the account of capital in respect of the proceeds arising from determinable or extraordinary investments or on the other hand to the account of income in respect of reversionary or contingent interests or other unproductive investments any rule of equity to the contrary notwithstanding [*Or* I DECLARE that in the meantime until the conversion and investment of my real and personal estates pursuant to the trusts hereinbefore contained my trustees shall have full discretionary power to adjust and determine all rights and equities as between tenant for life and reversioner or otherwise in

**Prec. 18.**

regard to capital and income upon such principles and in such manner as to my trustees shall seem just and reasonable with liberty to apply as income the whole amount of the actual proceeds and profits of such real and personal estate or any part thereof or to apply as income part only of such proceeds and profits and invest the residue thereof as capital but so that the income to be received by the tenant for life shall not be less than the rules of equity allow] AND as to as well the money (not applicable as income under the direction hereinbefore contained) to arise from my residuary personal estate as the money to arise from the sale of my freehold leasehold and copyhold estates I DIRECT my trustees to hold the same UPON TRUST with the consent in writing of my wife during her life if she shall continue my widow and after her death or marriage in the discretion of my trustees to invest the same (*e*) in their names in or upon some authorised trust investments AND UPON FURTHER TRUST to permit my wife to receive the income of the trust fund constituted of such moneys or of the investment thereof during her life if she shall continue my widow And after the determination of that trust as to the principal of the said trust fund with the future income thereof IN TRUST for my child if only one or my children if more than one in equal shares and so that the interest of each son shall be absolutely vested at the age of twenty-one years and of each daughter of that age or marriage whether the preceding trust shall have determined or not and so that the share as well accruing as original of a son dying under the age of twenty-one years and of a daughter dying under that age without having been married (*f*) shall accrue to the other or others of my children and if more than one in equal shares and be vested as aforesaid nevertheless as to the shares of daughters subject to the trusts hereinafter contained And if there shall not be any object of the preceding trust who shall acquire an absolutely vested interest UPON TRUST to dispose of one moiety of the said trust fund to or for such persons and purposes and in such manner as my wife if she shall continue my widow shall by her will appoint [*or* UPON TRUST to raise and pay out of the said trust fund such sum or sums of money

capital and income.]

Trusts of the produce of the real estate and residuary personal estate;

—to invest;

—to permit wife to receive income during widowhood;

—capital for testator's children equally, with benefit of accruer.

Ultimate trust, as to a moiety [*or*, as to a limited sum] for such persons as wife shall by will appoint; and subject to

**Prec. 18.**

such power, the whole for testator's brothers and sisters, and their issue living at testator's [*or* wife's] death, *per stirpes*.

not exceeding in the whole the sum of £—— as my wife if she shall continue my widow shall by her will direct to and for such persons and purposes and in such manner as she shall thereby direct] and as to the said trust fund subject to the power lastly hereby given to my wife IN TRUST for such of the class of persons following (namely) my brothers and sisters living at my death [*or* at the marriage or death of my wife] and the issue then living of my brothers and sisters dying in my lifetime [*or* dying in my lifetime or during the widowhood of my wife] as being males shall attain the age of twenty-one years or being females shall attain that age or be married distributively yet so that the issue shall participate only as representing their deceased parents I DECLARE that if any child of mine being a son and having attained the age of twenty-one years shall die in my lifetime leaving a widow or a child or children or both living at my death or if any child of mine being a daughter and having been married with my consent shall die in my lifetime leaving a child or children living at my death then the fund or share which under the aforesaid trust in favour of my children would have belonged to the child of mine so dying if such child had lived to become an object of and acquire an absolutely vested interest under the same trusts shall be held by my trustees upon trusts and subject to provisions in favour of the widow or the child or children or in favour of the widow and child or children as the case may be of the child of mine so dying corresponding with the trusts and provisions herein contained of and with respect to the said trust fund constituted as last aforesaid in favour of my wife or child or children or of my wife and child or children as the case may be and on failure of such trusts and provisions shall be disposable in the same manner as if this declaration had not been inserted (*y*) I DECLARE that my trustees shall retain the fund or the share or shares original and accruing to which each or any daughter of mine acquiring an absolutely vested interest shall become entitled by virtue of my will UPON TRUST to pay the income thereof as and when the same shall become due and not by way of anticipation into the proper hands of my same daughter to be enjoyed by her as an inalienable personal provision And

Widows and issue of sons, and issue of daughters, dying in testator's lifetime, to succeed to the shares of the deceased.

Trusts of shares of daughters;

—income to daughter for life.

**Prec. 18.**

I DECLARE that if during the life of my same daughter the same income or any part thereof shall from any cause whatever cease to be enjoyed by her as aforesaid [*or* if by reason of any act or default of my same daughter or by act of law the intent hereinbefore expressed that she shall enjoy the said annual income as a separate and inalienable personal provision shall be frustrated] the trust lastly hereinbefore contained shall thereupon be void and my trustees shall during the remainder of the life of my same daughter apply such income to or for the benefit of such object or objects for the time being of the trusts hereinafter contained concerning the same trust fund at such times and if more than one in such proportions and generally in such manner as my trustees shall in their absolute and uncontrolled discretion think fit [*or* then it shall be lawful for my trustees at any time during the life of my same daughter by any writing under their hands to declare such trusts and purposes concerning the said annual income during the remainder of the life of my same daughter in favour of any child children or issue of my same daughter or of any other child or children of mine or of the issue of any such other child or children or for the benefit of all or any of the objects aforesaid as my trustees shall in their absolute and uncontrolled discretion think expedient and immediately after such declaration shall be made the trust lastly hereinbefore contained shall cease and be void] And after the death of my same daughter then as to the principal with the future income IN TRUST for all or any of the issue of my same daughter including grandchildren and more remote issue born in her lifetime for such interests in such proportions and in such manner in all respects as my same daughter shall by deed or will appoint And in default of such appointment IN TRUST for the child if only one or all the children equally if more than one of my same daughter so that the interest or interests of such child or children shall be absolutely vested at the age of twenty-five years or such earlier age as such child or children respectively shall happen to have attained at the death of the survivor of my children and grandchildren who shall be living at the time of my death and the expiration of the term of twenty-one years

Cesser and gift over of income, if trust for daughter's separate use shall be frustrated.

[*Or* power enabling trustees to declare other trusts in the same event];

—capital for her children or more remote issue, as she shall appoint;

—in default of appointment, for her children equally, with accruer; but so as to postpone the vesting beyond the usual period;

**Prec. 18.** afterwards (*h*) whether the preceding trusts be determined or not and so that the share as well accruing as original of any child dying without having attained either of the alternative ages aforesaid shall accrue to the others or other of such children and if more than one in equal shares and be vested as aforesaid But no child in whose favour an appointment shall be made shall participate in the unappointed fund without bringing the appointed interest into distribution And if there shall not be any object of the preceding trust who shall acquire an absolutely vested interest Then IN TRUST for such persons or purposes and in such manner as my same daughter being discovert shall by deed or will or being covert shall by her will appoint And in default of appointment IN TRUST for the person or persons who at the death of my same daughter shall be of her blood and of kin to her and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she were dead intestate and a spinster such persons if more than one to take in the proportions prescribed by the said statutes [*or* upon such trusts as would by virtue of my will affect the same share or shares if my same daughter were dead without having acquired an absolutely vested interest therein under the trusts aforesaid] AND I EMPOWER my same daughter by her will to appoint all or any part of the income of the same share or shares to be paid to any husband who shall survive her for his life I DECLARE that my trustees shall have power to apply any part not exceeding one-half [*or* one-third part] of the capital to which each or any object [*or* male object] of the respective trusts and provisions hereinbefore contained concerning my trust fund shall be entitled in possession or reversion in or towards the establishment or advancement in the world of such object but so that if the object be entitled in reversion such application shall not be made without the consent in writing of the previous taker I DIRECT my trustees if my wife shall marry again to pay a clear annuity of £—— into her proper hands during her life by equal half-yearly payments to be enjoyed by her without power of anticipation as a separate and inalienable provision the first payment to be made at the end of six calendar months next after her marriage And I

if no child, for such persons as daughter shall appoint; —in default of appointment, for her next of kin,

[*or*, upon the trusts affecting the residue of the fund].

Power to appoint interest to husband.

Provision for advancement of infant objects.

Annuity to wife marrying again, to be secured by setting apart Two and Three-quarters per cent. stock.

**Prec. 18.**

further direct my trustees to set apart in their names out of my trust fund and invest upon some suitable authorised investment a sum sufficient at the period of appropriation to answer the same annuity which sum and the investments representing the same shall subject to the payment of such annuity be held upon the trusts affecting the residue of the said trust fund I DECLARE that a new trustee or trustees of my will may from time to time be appointed by my wife during her widowhood and subject as aforesaid in the manner prescribed by law (*i*) I APPOINT my wife she continuing my widow and the said [*trustees*] to be executors of this my will and my wife she continuing my widow and after her death or marriage the said [*trustees*] and after the death of the survivor of the said trustees my said brother [*name*] to be guardian or guardians of my infant children (*j*) I REVOKE all prior testamentary dispositions IN WITNESS &c.

Appointment of executors and guardians.

**NOTES to Precedent XVIII.**

"And" and "or."

(*a*) In these and similar limitations great care is necessary in the use of the conjunctions "and" and "or"; difficulties are continually arising from their indiscriminate application, and accordingly we find the Courts have often been called upon to rectify blunders of this nature. It would seem that, to induce the Courts to read "or" for "and," or *vice versâ*, there must be shown some sort of necessity, something beyond mere probability that the testator's own words do not indicate his real intention. The change must be made for the purpose of correcting a palpable mistake; or of avoiding an absolute absurdity; or of reconciling a contradiction or clear inconsistency; or of escaping from an uncertainty or ambiguity; or otherwise of giving effect to an indisputable intention—and cannot be made if any reasonable construction can be put upon the testator's words as they stand, *Re Hopkins's Trust*, 2 H. & M. 411, 415. The cases on this subject are collected, 1 Jarm. Wills, 470 *et seq.*

(*b*) See note (*g*), Prec. VIII.

Copyholds devisable before admittance.

(*c*) Under the old law an unadmitted heir could devise copyholds, but an unadmitted devisee or surrenderee could not. By sect. 3 of the Wills Act, *ante*, p. 4, either the heir or devisee or surrenderee is empowered to devise before admittance.

Power to sell copyholds.

In the text, the copyholds are excluded from the devise of the freeholds and leaseholds, in order that a common law power of sale and disposition may be vested in the trustees, by the exercise of which they may entitle a purchaser to admission without being themselves admitted. See also 2 Hayes, Conv. 80; 9 Byth. Jarm. 426; 3 Dav. Mart. 320 (*c*); and note (*b*) to Prec. V., *ante*, p. 159. The restriction of the

**Notes to Prec. 18.**

power to the period of twenty-one years is obviously to avoid infringing the rule against perpetuities, as to which see *post*, p. 323.

(*d*) See note (*b*), Prec. XV.

(*e*) See note (*b*), Prec. IV.

"Unmarried," meaning of.

(*f*) There is an ambiguity in the use of the word "unmarried" which has been the cause of frequent litigation. The ordinary and primary meaning of the word is "never having been married," *Dalrymple* v. *Hall*, 16 Ch. D. 715; 50 L. J. Ch. 302; *In re Sergeant*, 26 Ch. D. 575; 54 L. J. Ch. 159; the less accustomed meaning is "not being married at the time in question." It would seem that the word is to be construed in one sense or the other according to the particular circumstances of each case, *Maugham* v. *Vincent*, 9 L. J. Ch. 329; 4 Jur. 452; a doctrine which, supposing the first construction rejected, still leaves room for dispute as to the particular epoch to which the testator intended the word "unmarried" to refer, *Hall* v. *Robertson*, 4 D. M. & G. 781; 23 L. J. Ch. 241; 102 R. R. 391. It needs but a slight indication of intention to give the word its secondary instead of its primary meaning, *In re Sergeant*, *ubi sup.* See also *In re Lesingham's Trusts*, 24 Ch. D. 703; 49 L. T. 235, where the words obtained in their secondary meaning, and *In re Chant*, '00, 2 Ch. 345; 69 L. J. Ch. 601; 83 L. T. 341. If, however, a person is once entitled as "unmarried," a subsequent marriage does not deprive him of his right. In many settlements the word "unmarried" is used only for the purpose of excluding the marital rights of a husband, the intention being to exclude him only, and not any class of next of kin, *Pratt* v. *Mathew*, 8 D. M. & G. 522; *Clarke* v. *Colls*, 9 H. L. C. 601; *Wilson* v. *Atkinson*, 4 D. J. & S. 455. Refer also to 1 Jarm. Wills, 484; *Reg.* v. *Inhabitants of Wymondham*, 2 Q. B. 541; *Blagrove* v. *Coore*, 27 Be. 138; *Re Sanders's Trusts*, L. R. 1 Eq. 675; *Re Ball's Trusts*, 11 Ch. D. 270; 48 L. J. Ch. 279; 40 L. T. 880; *Upton* v. *Brown*, 12 Ch. D. 872; 48 L. J. Ch. 756; 41 L. T. 340; *Emmins* v. *Bradford*, 13 Ch. D. 493; 49 L. J. Ch. 222; 42 L. T. 45.

As to providing against lapse.

(*g*) Wills are commonly framed upon the assumption that the state of circumstances existing at the time of execution will remain unchanged until the testator's decease; hence the infrequency of any provision against lapse. It is true that the event of the gift lapsing would, in most cases, be best met by a new will or a codicil, adapted to the change of circumstances; yet, as the testator may be prevented from revising his disposition or be unapprised of its partial failure, a prospective provision, if it should not be exactly suited to the exigency, may still obviate much of the inconvenience and hardship of the case. For instance, it sometimes happens that one of the objects of the testator's bounty dies, leaving issue, upon whom the testator might wish to confer the benefit intended for their parent; his death may happen when the testator is *in extremis*, so as to be incapable of altering his will, or may happen at a distance remote from the testator, so that tidings of the event do not reach him before his own death. The case, however, of issue of the testator himself dying in his lifetime, and in his will referred

**Notes to Prec. 18.**

to by name (or otherwise individually and not as one of a class), is now provided for, see 1 Vict. c. 26, s. 33, *ante*, p. 77. The testator and his legatee may die under circumstances which raise the nice and difficult point respecting probable or presumed survivorship, as where they both perish on board a ship foundering at sea, see *Mason* v. *Mason*, 1 Mer. 308; *Underwood* v. *Wing*, 4 D. M. & G. 633; 24 L. J. Ch. 293; 102 R. R. 316. In *Elliott* v. *Smith*, 22 Ch. D. 236; 52 L. J. Ch. 222; 48 L. T. 27, where testator and legatee both died in a collision of steam vessels, and there was nothing to show who died first, a gift over on the death of the legatee was held not to have taken effect, as the death of the legatee must, according to *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; 31 L. T. 705, be taken to have meant death in the testator's lifetime. The bequest therefore fell into the residue.

Words providing for death of objects, to what period referable.

Whether words providing against the death of devisees or legatees apply to the event occurring in the lifetime of the testator, or at any and what subsequent period, is a question which has been frequently discussed and variously decided. One class of such cases relates to bequests simply to A., and, in case of his death, over; raising the question, therefore, whether these words are to be construed as synonymous with "at or after" the death, which could cut down the interest of the legatee to whose death reference is made to an interest for life; or whether death is to be combined with some other circumstance, in order to satisfy the terms of contingency applied to it, death being in itself a certain and inevitable event. The contingent construction has prevailed, and, in adopting it, the obvious course is to consider the uncertainty contemplated by the testator as referring to the time of death; a point which is easily disposed of when the gift, being simply to take effect in possession at the testator's decease, presents no other period to which the words in question can be referred, *Lowfield* v. *Stoneham*, 2 Stra. 1261; *Hinckley* v. *Simmons*, 4 Ves. 160; *King* v. *Taylor*, 5 Ves. 806; 5 R. R. 172; *Cambridge* v. *Rous*, 8 Ves. 12; 6 R. R. 199; *Webster* v. *Hale*, 8 Ves. 410; 7 R. R. 103; *Ommaney* v. *Bevan*, 18 Ves. 291; *Wright* v. *Stephens*, 4 B. & Al. 574; 23 R. R. 397.

Words providing for death of objects;

But this construction seems to be confined to such cases; for it has been held, that where the will supplies a period of distribution subsequent to the death of the testator, the words are referable to that period, *Hervey* v. *M'Laughlin*, 1 Pri. 264; 16 R. R. 713; *Whitton* v. *Field*, 9 Be. 368; *Girdlestone* v. *Doe*, 2 Sim. 225; 29 R. R. 87; *In re Eve*, 93 L. T. 235; *In re Edwards*, '06, 1 Ch. 570; 75 L. J. Ch. 321; 94 L. T. 593. In *Edwards* v. *Edwards*, 15 Be. 357; 92 R. R. 464; the construction of gifts of this nature was stated to be as follows: (1) a gift to A., and if he shall die, to B.; the contingency has reference to the death of the testator: (2) a gift to A., and if he shall die without children, to B.; the contingency has reference to the death of A.; (3) a gift to Z. for life, with remainder to A., and if he shall die, to B.; or (4) a gift to Z. for life, with remainder to A., and if he shall die without leaving children, to B.; in either case the contingency has reference to

*Edwards* v. *Edwards*.

**Notes to Prec. 18.**

the death of Z. the tenant for life. See also *Dean* v. *Handley*, 2 H. & M. 635; *Lewin* v. *Killey*, 13 App. Cas. 783; 59 L. T. 675; Hawkins, Constr. Wills, 254 *et seq.* The canons laid down in *Edwards* v. *Edwards* were approved in *Bowers* v. *Bowers*, L. R. 5 Ch. 244; 39 L. J. Ch. 351; 22 L. T. 35; *Re Hill's Trusts*, L. R. 12 Eq. 302; 40 L. J. Ch. 594; 24 L. T. 494; and *Re Heathcote's Trusts*, L. R. 9 Ch. 45; 29 L. T. 445; but the last-mentioned decision was reversed in the House of Lords, and the fourth canon was overruled, *O'Mahoney* v. *Burdett*, 7 H. L. 388; 31 L. T. 705; *Ingram* v. *Soutten*, 7 H. L. 408; 44 L. J. Ch. 55; 31 L. T. 215; *In re Luddy*, 25 Ch. D. 394; 53 L. J. Ch. 21; 49 L. T. 706; *In re Schnadhorst*, '02, 2 Ch. 234; 71 L. J. Ch. 454; 86 L. T. 426; *McCormick* v. *Simpson*, '07, App. Cas. 494; 77 L. J. P. C. 12; 97 L. T. 616. See, however, *Olivant* v. *Wright*, 1 Ch. D. 346; 45 L. J. Ch. 1; 33 L. T. 457; *Besant* v. *Cox*, 6 Ch. D. 604, as to what is sufficient context to restrict the contingency to the period of distribution. It is well established, that if a testator devises or bequeaths property to A., and in case of his death under the age of twenty-one years to B., the gift to B. will take effect in the event of A. dying under the prescribed age, either in the lifetime of the testator or afterwards, *Miller* v. *Warren*, 2 Ver. 207; *Willing* v. *Baine*, 3 P. W. 113; *Doe* v. *Brabant*, 3 Br. C. 393; *Humberstone* v. *Stanton*, 1 V. & B. 385; 12 R. R. 243; *Williams* v. *Jones*, 1 Russ. 517. And it would not, it seems, be conclusive against this construction, that the gift over purported to dispose of the "share" or "legacy" of the prior devisee or legatee, who could not, strictly speaking, be an object of gift until the testator's decease, *Humphreys* v. *Howes*, 1 R. & M. 639; *Walker* v. *Main*, 1 J. & W. 1; 20 R. R. 202; *Harris* v. *Davis*, 1 Col. 416; 66 R. R. 130. See also *Re Gaitskell's Trusts*, L. R. 15 Eq. 386; 28 L. T. 760.

—when not referable to death in testator's lifetime.

When there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely although he would have taken nothing if any previous legatee had survived and taken, the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift, *Re Lowman*, '95, 2 Ch. 348; 64 L. J. Ch. 567; 72 L. T. 816.

In some instances, however, words expressly pointing at the death of the legatee have been construed to apply exclusively to such event occurring after the testator's death; the postponement of payment affording a period subsequent to the death of the testator to which they could be referred. Thus, if a testator bequeaths property to A. for life, and after his death to his children, and provides, that, in case of the death of any of the legatees before their legacies become payable, then the legacy of each so dying shall go to his executors or administrators; these words will be construed as embracing the event of any of the children dying in the interval between the testator's death and the death of A., and not as disposing of the legacies failing by lapse, *Corbyn* v. *French*, 4 Ves. 418; 4 R. R. 254; *Bone* v. *Cook*, M'Cl. 168;

**Notes to Prec. 18.**

28 R. R. 697. These cases, however, seem to form a distinct class, and may, it is conceived, be regarded as exceptions to the general rule already stated.

A testator gave his residuary estate to trustees, in trust for his mother for life; after her death, in trust for all the younger children of his two sisters, to be vested interests at twenty-one, with the usual provision for the others or other of the said children in case of the death of any under twenty-one; he then made provision for maintenance by directing the trustees to pay the interest of the presumptive share of any child during minority to its mother: it was held that the fund went to the children living at the death of the tenant for life, those dying under twenty-one having defeasible interests, *Berkeley* v. *Swinburne*, 16 Sim. 275; 80 R. R. 64. See that case explained in *In re Emmet's Estate*, 13 Ch. D. 484; 49 L. J. Ch. 295; 42 L. T. 4.

See, as to lapse, *Elliot* v. *Davenport*, 1 P. W. 83, in Tud. L. C. R. P.

Questions as applied to gifts to classes.

Gifts to classes of persons who are not ascertainable until the death of the testator impose the necessity of particular care in preparing clauses which are intended to dispose of the shares of members of the class dying in the testator's lifetime; for, as persons so dying are not objects of the preceding gift, they are not within the clauses in question, if construed strictly as substitutional. Thus, where a testator bequeathed a sum of money owing to him by A. to the younger children of A., to remain in A.'s hands until the children should be capable of receiving it, and the legacy or share of any of them dying before such time to go to the survivors and survivor of them, it was considered that this must be intended if the legatee should have survived the testator; but that where the legatee died in the lifetime of the testator, as nothing could vest in the legatee, so neither could it survive from him, *Rider* v. *Wager*, 2 P. W. 331. So, where a testator gave the residue of his estate to the children of his brother A. and of his late brother and sister B. and C., who should be living at the death of A. and his wife, in equal proportions; and as to such of them as should be then dead leaving a child or children, such child or children was or were to be or stand in the place of his, her, or their parent or parents; it was held that the bequest was confined to the children of such of the legatees as survived the testator and afterwards died before the time of distribution; and that the children of those who died in the testator's lifetime were not entitled to participate, *Butter* v. *Ommaney*, 4 Rus. 70; 28 R. R. 6. In the most recent case on this subject, *Re Hannam*, '97, 2 Ch. 39; 66 L. J. Ch. 471; 76 L. T. 681, a gift in a will, to take effect after a life estate, to a class ascertainable at the death of the testator, with a substantial gift to the children of deceased members of the class instead of their parents, did not let in the children of parents who died in the testator's lifetime, but who would have been members of the class if they had survived. In several cases, a strong disposition has manifested itself to extend clauses disposing of the "shares" of persons dying before the period of distribution to those who die in the testator's lifetime, though the preceding gift is to a class of objects (as children)

Clauses of substitution.

**Notes to Prec. 18.**

Lapse; gifts to classes; substitution.

not ascertainable until the testator's death, and therefore, it might seem, having no "share" or interest upon which the clause in question can operate, *Willing* v. *Baine*, 3 P. W. 113; *Walker* v. *Main*, 1 J. & W. 1; 20 R. R. 202; *Humphreys* v. *Howes*, 1 R. & M. 639; *Smith* v. *Smith*, 8 Sim. 353; 42 R. R. 208. In another case even the children of a person who had died previously to the making of the will were held to be entitled; there being a substantive original gift to the children of deceased objects concurrently with the living objects, and not a mere clause of substitution, *Tytherleigh* v. *Harbin*, 6 Sim. 329; 38 R. R. 121. Indeed, in several subsequent instances, clauses of substitution, though in terms applicable to future events, have been extended to let in the issue of persons who were dead when the will was made, the conclusion from the whole will being that the testator intended to embrace such objects, *Giles* v. *Giles*, 8 Sim. 360; 42 R. R. 205; *Jarvis* v. *Pond*, 9 Sim. 549; 47 R. R. 309; *Loring* v. *Thomas*, 1 Dr. & S. 497; 30 L. J. Ch. 789; 5 L. T. 269; *In re Gorringe*, '07, App. Cas. 225; 76 L. J. Ch. 527; 97 L. T. 111. See also *In re Kinnear*, 90 L. T. 537; *In re Lambert*, '08, 2 Ch. 117; 77 L. J. Ch. 553; 98 L. T. 851; *In re Cope*, '08, 2 Ch. 1; 77 L. J. Ch. 558; 99 L. T. 374; *In re Metcalfe*, '09, 1 Ch. 424; 78 L. J. Ch. 303; 100 L. T. 222.

Conclusion deduced from the cases.

The result appears to be, that if there is a gift to children living at a definite time, and a substitutionary gift to issue, all the children living at the date of the will must be taken into account, whether they die in the testator's lifetime or not; and no other grandchildren take except those who are children of children alive at the date of the will, *Butter* v. *Ommaney*, 4 Rus. 70; 28 R. R. 6; *Christopherson* v. *Naylor*, 1 Mer. 320; 15 R. R. 120; *Re Thompson's Trusts*, 5 D. M. & G. 280; 104 R. R. 122; *In re Webster's Estate*, 23 Ch. D. 737; 52 L. J. Ch. 767; 49 L. T. 585; *In re Chinery*, 39 Ch. D. 614; 57 L. J. Ch. 804; 59 L. T. 303; *In re Musther*, 43 Ch. D. 569; 59 L. J. Ch. 296; but if there is a gift to children living at a definite time, and a distinct gift to the issue of children dying before that time, with a proviso that the issue shall take only their parent's share, then, notwithstanding the proviso, and notwithstanding that children dead at the date of the will take no share at all, all the grandchildren are let in; and the reason is, that the second clause is too obscure to abrogate and do away with the clear and substantive gift contained in the first clause, *Tytherleigh* v. *Harbin*, 6 Sim. 329; 38 R. R. 121; *Gaskell* v. *Holmes*, 3 Ha. 438; 64 R. R. 371. See also *Re Chapman's Will*, 32 Be. 382; *Re Potter's Trust*, L. R. 8 Eq. 52; 39 L. J. Ch. 102; 20 L. T. 249; *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643; 38 L. J. Ch. 631; *Adams* v. *Adams*, L. R. 14 Eq. 246; 27 L. T. 505; *Hunter* v. *Cheshire*, L. R. 8 Ch. 751; 29 L. T. 383; *In re Speakman*, 4 Ch. D. 620; 46 L. J. Ch. 608; 35 L. T. 731; *West* v. *Orr*, 8 Ch. D. 60; 47 L. J. Ch. 294; 38 L. T. 5; *In re Woolrich*, 11 Ch. D. 663; 48 L. J. Ch. 321; 41 L. T. 309; *In re Roberts*, 27 Ch. D. 346; 53 L. J. Ch. 1023; 51 L. T. 654; *In re Offiler*, 83 L. T. 758; the point is, whether the gift to the issue is an original gift or a substitutional one.

**Notes to Prec. 18.**

(*h*) A perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity. (Sanders on Uses and Trusts.)

Perpetuities, definition of.

A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation except with the concurrence of the individual interested under that limitation. (Lewis on Perpetuities.)

Rule against perpetuities.

A limitation of estate which postpones the vesting for a life in being (including, by necessary consequence, any number of existing lives), and a further term of twenty-one years, is valid; but any limitation which postpones the vesting for a longer period is invalid as tending to a perpetuity. However, where gestation actually exists, the period of gestation is added to the above limit, *Cadell* v. *Palmer*, 1 C. & F. 372.

The death of the testator, and not the date of his will, is to be considered with respect to the question of a devise being too remote, *Vanderplank* v. *King*, 3 Ha. 1; 64 R. R. 186; *Williams* v. *Teale*, 6 Ha. 239; 77 R. R. 100.

Postponement for more than twenty-one years, without a life, void.

It is observable that a testator is not allowed a longer term of years on account of his not availing himself of a life; and, therefore, a gift which postpones the vesting for an absolute period of twenty-one years and one day, without a life, is void, no less than one which suspends the vesting for a life and twenty-one years and a day, *Palmer* v. *Holford*, 4 Rus. 403. In *Lachlan* v. *Reynolds*, 9 Ha. 796; 89 R. R. 686, a gift at the end of thirty years was supported on the ground that it was ultimately to vest in persons living at the death of the testator and at the end of the thirty years, and the vesting must therefore take place, if at all, in the life of a person in being at the testator's death.

A gift over if there should be no child or other issue of a tenant for life who should survive the testator and the tenant for life is not void for remoteness, for the word "survive" means that the person to survive shall be living at the time of the event which he is to survive, *Gee* v. *Liddell*, 35 Be. 658; L. R. 2 Eq. 341; 35 L. J. Ch. 640. But as to "survive," see *Re Clark*, 3 D. J. & S. 111.

Gift cannot be moulded according to the event.

In the application of the rule under consideration, it is an established principle, that a devise or bequest which exceeds the allowed limit cannot be moulded into consistency with the rule of law, because the events have turned out to be such as would have admitted of the gifts being duly restricted; for the construction is to be made according to events which might have happened, and not according to events which have happened; and though it may be probable that, if it had been proposed

**Notes to Prec. 18.**

Rule against perpetuities.

to the testator that he should restrict his gift within such limits as the law requires rather than, by a retention of his whole purpose, vitiate the entire disposition, he would have consented to abandon the illegal part of his scheme; yet, as he has expressed no such consent the Courts have not assumed the power of acting upon the hypothesis. Thus, if real or personal estate is given to the eldest son of A. (who at the time of the testator's death has no son), and in case such son shall die under the age of twenty-two, then to the second son of A., the latter gift is void, though A.'s eldest son should die under the age of twenty-one years, so that the ulterior gift, if confined within the allowed limits (*i.e.* if made to take effect in case the son had died under twenty-one), would in event have been effectual, see *Robinson* v. *Hardcastle*, 2 Br. C. 22; 1 R. R. 467; *Cambridge* v. *Rous*, 8 Ves. 12; 6 R. R. 199; *Yawdry* v. *Geddes*, 1 R. & M. 203; 32 R. R. 196; *Thomas* v. *Wilberforce*, 31 Be. 299. The rule is that a bequest or devise is void for remoteness, if it shall not of necessity take effect within the period of a life or lives in being at the testator's death, and twenty-one years afterwards. This is very strikingly illustrated by *Re Lord Stratheden and Campbell*, '94, 3 Ch. 265; 63 L. J. Ch. 872; 71 L. T. 225, where a gift of an annuity of 100*l.* to the Central London Rangers Volunteer Corps "on the appointment of the next Lieutenant-Colonel," was held void on this ground. See *In re Good*, '05, 2 Ch. 60; 74 L. J. Ch. 512; 92 L. T. 796, and *In re Donald*, '09, 2 Ch. 410; 78 L. J. Ch. 761; 101 L. T. 377. Also, a gift to the person who for the time being shall be heir male of the body of A., and shall live to attain the age of twenty-one years, is void; though it may happen that the heir male of the body of A. who first attains majority was living at the testator's death: nor will the vice of remoteness be eradicated by a disposition of the profits until such heir should attain twenty-one, *Lord Dungannon* v. *Smith*, 12 C. & F. 546; 69 R. R. 137. But a gift of the *corpus* of a fund, and the gift of the income thereof in the interim, may be independent of each other, so that the gift of the income (*e.g.* for maintenance) may be good, though the gift of the *corpus* is bad, *Re Wise*, '96, 1 Ch. 281; 65 L. J. Ch. 281; 73 L. T. 743. But see *In re Blew*, '06, 1 Ch. 624; 75 L. J. Ch. 373; 95 L. T. 382.

Alternative gifts void in one event and good in another.

However, it may, and often does, occur, that a gift over is framed so as to take effect on a double contingency, one branch of which is within and the other is beyond the legal limit, which will therefore be good or bad according to the event. Thus, if a testator devises land to the first son of A. who should attain the age of twenty-two years, in fee, and if such son should die under the age of twenty-two years, or if A. should have no son, then to B. in fee; the gift to B. is precisely in this predicament. There are, it will be observed, two distinct devises to him; one to take effect if A. should have a son who should die under twenty-two, which is too remote, and is therefore void, whatever may happen to be the age at which such son dies; the other to arise in the event of A. having no son, which is good, as being necessarily to vest within a life in being, see *Leake* v. *Robinson*, 2 Mer. 363; 16 R. R. 168; *Crompe*

**Notes to Prec. 18.**

Rule against perpetuities.

v. *Barrow*, 4 Ves. 681; 4 R. R. 318; *Cambridge* v. *Rous*, 8 Ves. 12; 6 R. R. 199; *Minter* v. *Wraith*, 13 Sim. 52; *Re Thatcher's Trusts*, 26 Be. 365.

A testator, who died in 1858, by his will dated in 1845, devised certain freehold property to his son for life, with remainder to his grandson in fee. Subsequently the testator became entitled to the payment of a sum of money for certain lands taken by a railway company for the purposes of their undertaking. Accordingly, by a codicil dated in 1857, the testator bequeathed this sum to his son and his two daughters in equal shares; and he directed that "if the minerals" under the devised property "should be worked," the same should "be divided in the same manner as before mentioned in three parts equal shares." It was held that the gift of the minerals to the testator's son and daughters, not being a present one, so that the minerals should pass to them immediately, but a conditional one, the division of the proceeds depending on the working and sale of the minerals, which condition might not happen within the period allowed by law, the gift was void under the rule against perpetuities, *Thomas* v. *Thomas*, 87 L. T. 58.

These cases depend on the fact that there are really two distinct gifts over depending on two distinct and several events. If one of the events is within the limit, the gift over which depends on that event takes effect, and there can be no reason for holding that gift over invalid merely because in another event which is too remote the gift over which depends on this too remote event is invalid.

But where there is a gift over on one compound event, which includes events too remote and events not too remote, it cannot be split up so as to make it valid in case of the nearer events happening. Thus if there is a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, it is evident that the event on which the gift over depends might happen either within or beyond the period of the life of A. and twenty-one years after. Thus if A. had no son the event would have happened within the period allowed by the rule against perpetuities. But because the event was expressed as a compound event, it will not be split up, and the fact that the limit might be exceeded will invalidate the gift over, *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; 3 R. R. 417; *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; 69 R. R. 137; *Burley* v. *Evelyn*, 16 Sim. 290; 80 R. R. 74; *Monypenny* v. *Dering*, 2 D. M. & G. 145; 22 L. J. Ch. 313; 95 R. R. 52; *Miles* v. *Harford*, 12 Ch. D. 691; 41 L. T. 378; *Abbiss* v. *Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348; 44 L. T. 267; *In re Harvey*, 39 Ch. D. 289; 60 L. T. 79; *In re Bence*, '91, 3 Ch. 242; 60 L. J. Ch. 636; 65 L. T. 530. See the comments on *Watson* v. *Young*, 28 Ch. D. 436; 54 L. J. Ch. 502, by the Court of Appeal in *In re Bence*. If the testator had made the gift to A. for life, and in case he shall have no son who shall attain the age of twenty-five years, or if he shall have no son, then over, this would have been the case of two distinct gifts over depending on two distinct events, one valid, the other invalid; and if the valid

**Notes to Prec. 18.**

Rule against perpetuities.

event had occurred, the gift over would have been valid within the above first-stated rule as to gifts over. See also *Evers* v. *Challis*, 7 H. L. C. 531; 29 L. J. Q. B. 121; *In re Hancock*, '02, A. C. 14; 71 L. J. Ch. 149; 85 L. T. 729; *In re Barker*, 92 L. T. 831.

Restriction against alienation by married women.

It would seem that on a bequest to persons *in esse* for life, and afterwards to their unborn children, with a general direction that female children should take for their "separate and inalienable use," the restriction against alienation would be too remote and would be void, *Armitage* v. *Coates*, 35 Be. 1. See also *Fry* v. *Capper*, Kay, 163; *Re Teague's Settlement*, L. R. 10 Eq. 564; 22 L. T. 742; *Re Cunyngham's Settlement*, L. R. 11 Eq. 324; 40 L. J. Ch. 247; 24 L. T. 124; *In re Ridley*, 11 Ch. D. 645; 48 L. J. Ch. 563; *Herbert* v. *Webster*, 15 Ch. D. 610; 49 L. J. Ch. 620; *In re Ferneley's Trusts*, '02, 1 Ch. 543; 71 L. J. Ch. 422; 86 L. T. 413; *In re Millward*, 87 L. T. 476.

Executory limitation after an estate tail not too remote.

An executory devise, however remote, may be engrafted on an estate tail; for such an estate being an estate of inheritance, and the owner thereof being competent to defeat the executory limitation and to alien the fee simple, the rule against perpetuities has no place, such rule only requiring that the absolute estate or interest in the subject-matter of the limitation be not kept in suspense beyond the allowed period, *Nicolls* v. *Sheffield*, 2 Br. C. 215. But the trusts of a term limited previously to an estate tail, for raising portions on the failure of the estate tail, are invalid as trenching on the rule against perpetuities, the term not being defeasible by the tenant in tail, *Case* v. *Drosier*, 5 M. & C. 246; *Sykes* v. *Sykes*, L. R. 13 Eq. 56; 51 L. J. Ch. 25; 25 L. T. 560.

That a devise in tail after payment of debts is not too remote, see *Rimington* v. *Cannon*, 12 C. B. 18; 92 R. R. 590. And a rentcharge by way of use, vested in an existing person and his heirs in fee simple, but to commence at an uncertain future period, is not void for remoteness, *Gilbertson* v. *Richards*, 5 H. & N. 453; and see Sugd. Pow. 15. But an executory interest to arise on a future event which may not happen within the perpetuity limits is void, though limited to an ascertained person who can release it any time, *London and South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449.

As to gifts to classes which are too remote.

Consistently with the principle which forbids our having recourse to subsequent events in order to determine the validity of a devise, it is clear that a gift to a class extending to persons beyond the allowed line is void, although the class may happen to be entirely composed of individuals competent to have been objects of gift; for, as they claim in a collective character, the accidental circumstances of their respective situation cannot impart validity to their claim. Thus, if a gift is made to A. for life, and after his death to the children of A. who shall attain the age of twenty-two years, although all the children of A. who attain twenty-two should happen to have been born in the testator's lifetime (and who might therefore, as being persons *in esse*, have taken interests to vest at any age), yet the gift, not being confined to them, but

**Notes to Prec. 18.**

Rule against perpetuities.

embracing in its scope children born at any time during the life of A., whether in the lifetime or after the death of the testator, is too remote, on account of the postponement of the vesting beyond the age of twenty-one years, *Arnold* v. *Congreve*, 1 R. & M. 209; *Newman* v. *Newman*, 10 Sim. 51; 51 R. R. 206; *Williams* v. *Teale*, 6 Ha. 239; 77 R. R. 100; *Smith* v. *Smith*, L. R. 5 Ch. 342; *Hale* v. *Hale*, 3 Ch. D. 643; 35 L. T. 933; *Bentinck* v. *Duke of Portland*, 7 Ch. D. 693; 47 L. J. Ch. 235; 38 L. T. 58. The rule requires that not only the extreme limit of the class, but the actual persons to take, should be ascertained within the prescribed period, *Blight* v. *Hartnoll*, 19 Ch. D. 294; 51 L. J. Ch. 162; 45 L. T. 524. And the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members, *Pearks* v. *Moseley*, 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449; *In re Mervin*, '91, 3 Ch. 197; 60 L. J. Ch. 671; 65 L. T. 186. See also *In re Bowles*, '05, 1 Ch. 371; 74 L. J. Ch. 338; 92 L. T. 556.

The ordinary causes of the excessive remoteness of gifts to children as a class are, that they either include the issue of unborn persons, or defer the vesting of the shares of unborn children to an age later than majority. A testator is in less danger of overstepping the legal boundary whilst providing for his own children and grandchildren, than when the objects of his bounty are the children or grandchildren of another; since he has only to avoid protracting the vesting of his grandchildren's shares beyond their ages of twenty-one years. If the vesting of a grandchild's share is postponed until the death of the survivor of its parents, the gift is too remote; since a child of the testator may marry a person born after the testator's death, and that parent may be the survivor, *Hodson* v. *Ball*, 14 Sim. 574; 65 R. R. 642; *Lett* v. *Randall*, 3 S. & G. 83; 24 L. J. Ch. 708; 107 R. R. 26; *Buchanan* v. *Harrison*, 1 J. & H. 662; 31 L. J. Ch. 74. But if the vesting be not postponed beyond majority, the extension of the gift to after-born grandchildren would not invalidate it, because all the children of a testator must be *in esse* at his decease, and their children must be born in *their* lifetime, which brings it within the compass of a life in being at the death of the testator. On the other hand, a gift embracing the whole range of the grandchildren of a living person, other than the testator himself, would be clearly void, though the vesting was to take place at majority, or even at the instant of birth, or the grandfather might have children born after the testator's decease; and as the gift would extend to the children of such after-born children, it would be too remote.

In *Elliott* v. *Elliott*, 12 Sim. 276; 56 R. R. 60, a bequest to the children of A., "as and when they should attain their respective ages of twenty-two years," was held to refer only to the children of A. born during testator's lifetime, and to be valid. This case was followed by Stirling, J., in *In re Coppard's Estate*, 35 Ch. D. 350; 56 L. J. Ch. 606; 56 L. T. 359.

A gift to the children of A. and the grandchildren of B. (a living person) is void for remoteness, the whole gift failing by reason of the

**Notes to Prec. 18.**

Rule against perpetuities.

failure as to part, *Leake* v. *Robinson*, 2 Mer. 363; 16 R. R. 168. But after a devise to A. for life, with remainder to the children of A. for their lives, equally, a devise over, of the share of any child dying, to his children, is good as to the children of such children of A. as were living at the testator's death, the gift to every member of the class being single and independent of the gift to every other member, *Cattlin* v. *Brown*, 11 Ha. 372; 90 R. R. 733. And if the shares are necessarily ascertained within due limits, it is immaterial that, as to some particular shares, conditions are superadded which may or may not be void for remoteness, *Pearks* v. *Moseley*, 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449.

Gift to an unborn person taking holy orders.

A gift to an unborn person, to take effect on his performance of an act which cannot be done until the attainment of an age posterior to majority, is clearly bad. Of this nature is a devise or bequest to the first unborn son of A. who shall take holy orders; for, as the canons of the Church of England require deacons to be twenty-three, and priests to be twenty-four, years of age, it follows that if A. should die, leaving a son under two years of age, the vesting would necessarily be deferred beyond a life in being and twenty-one years afterwards, *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; 3 R. R. 417.

Gift to an unborn person on an event which may or may not happen within due limits.

Where the act, the performance of which is made a condition precedent to the vesting, is of such a nature that it may be performed either before or after the devisee's majority, as entering at a university, taking a commission in the army, or the like, the fate of the gift seems to be more questionable; but, even in this case, it appears by the better opinion to be void, for the doctrine to be gathered from the authorities is, that the gift must necessarily take effect within the period allowed by the rule of law, or fail, *Tollemache* v. *Earl of Coventry*, 2 C. & F. 611; 37 R. R. 260. Indeed, even in the case before suggested, of a gift to a person taking orders, there is only a possibility of remoteness, because an unborn son of A. might attain the age of twenty-three or twenty-four, and be ordained in the lifetime of his father, and then the gift would in the event be confined within the compass of a life in being.

Application to powers of selection and distribution.

Particular power.

Where a power of appointment is created by deed or will in favour of a defined class of objects, the appointment must be made to persons competent to have taken immediately under the instrument creating the power. The donee of a particular power, in exercising his power, can only limit the property in the same manner as the donor could have done, for the rule against perpetuities begins to run from the date of the instrument creating, and not of the instrument executing, the particular power. The power, however, is not void, because it includes, or may include, objects exceeding the perpetuity limits, *Griffith* v. *Pownall*, 13 Sim. 393; *Thomas* v. *Thomas*, 14 Sim. 234; *Attenborough* v. *Attenborough*, 1 K. & J. 296; and if it is exercised in favour of persons within the limits, the appointment is a good one, *Hockley* v. *Mawbey*, 1 Ves. J. 150; 1 R. R. 93; *Wilkinson* v. *Duncan*, 30 Be. 111; 30 L. J. Ch. 938; 5 L. T. 171; *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch.

**Notes to Prec. 18.**

Rule against perpetuities.

General power.

205; and see *Jesson* v. *Wright*, 2 Bli. 1; Sugd. Pow. 397. Where a testator having under a settlement a special power of appointment exercised it in favour of his daughters who should survive him and attain twenty-four years of age, and at his death his youngest daughter was over three years old, the appointment was upheld, *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263. A general power does not interfere with the freedom of alienation, and has no tendency to a perpetuity; consequently the rule against perpetuities begins to run from the date of the instrument executing the power, Lewis, Perpet. 483. And this applies whether the general power is exercisable by deed or will, or by will only, *Rous* v. *Jackson*, 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733, in which case Chitty, J., declined to follow *In re Powell's Trusts*, 39 L. J. Ch. 188; 18 W. R. 228. Limitations depending or expectant upon a prior limitation which is void for remoteness are themselves invalid, but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities, *In re Abbott*, '93, 1 Ch. 54; 62 L. J. Ch. 46; 67 L. T. 794.

Powers to appoint to the issue of a marriage are frequently vested by an ante-nuptial settlement in both or one of the marrying parties; which powers must be exercised in favour of issue born in the lifetime of the parents or one of them, which, indeed, the children of the marriage necessarily are, so that an express restriction is never required, unless the power embraces remoter issue, *Robinson* v. *Hardcastle*, 2 T. R. 241; 1 R. R. 467; *Bristow* v. *Warde*, 2 Ves. 336; 2 R. R. 235; *Crompe* v. *Barrow*, 4 Ves. 681; 4 R. R. 318. As before observed, even where a power is not in terms duly restricted, yet, if it is exercised in favour of individuals who are within the line, the appointment is valid. In the converse case, *i.e.* where the power is duly restricted, but the appointment is not, the latter is a mere nullity *quoad* the remote appointees; and therefore, even if it were made to the whole as a class, yet, as the remote appointees are not objects of the power, the extension of the appointment to them would not prevent its taking effect as to the competent objects. If, however, the power is unrestricted, and the appointment is to a class embracing objects who are too remote, it will be void *in toto*, according to the rule applicable to gifts in general, *Routledge* v. *Dorril*, 2 Ves. 357; 2 R. R. 250.

It is also to be observed, that where an appointment is in the first instance made in favour of certain objects who are within the scope of the power, and there is engrafted on this a clause settling the shares of one or more of the appointees in a manner not authorised by the power, and which would be void as exceeding the limit of the rule against perpetuities, the effect is not to invalidate the appointment in regard to such share or shares, but solely to detach from it the clause in question, leaving the appointment to take effect as a simple absolute disposition, according to the mode in which it originally stood, *Carver* v. *Bowles*, 2

**Notes to Prec. 18.**

Rule against perpetuities.

R. & M. 304; *Kampf* v. *Jones*, 2 Ke. 756; 7 L. J. Ch. 63; *Ring* v. *Hardwick*, 2 Be. 352; 50 R. R. 202; *Church* v. *Kemble*, 5 Sim. 525; 3 L. J. Ch. 65; *Rucker* v. *Scholefield*, 1 H. & M. 36; 32 L. J. Ch. 46; *Cooke* v. *Cooke*, 38 Ch. D. 202; 59 L. T. 693. But the clause, in a case where the appointee has executed or assented to the deed of appointment, may be valid as a settlement by the appointee.

In *In re Russell*, '95, 2 Ch. 698; 64 L. J. Ch. 891; 73 L. T. 195, a testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age, with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained twenty-one, and she was born in the lifetime of the testator. *Held*, that the proviso for resettlement of the shares must be construed as applicable to each share separately, and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund.

A testatrix, having under her marriage settlement power to appoint a fund in favour of her children, by her will appointed a portion of the fund to her son C. for life, and after his death to such persons as he should by will appoint; the appointment to C.'s appointees was void for remoteness, *Wollaston* v. *King*, L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392; *Morgan* v. *Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410; 28 L. T. 434. But such an appointment in favour of a person in being at the date of the instrument creating the power, and his appointees, would be good, *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch. 205; 31 L. T. 712.

Life interest may be given to an unborn person.

The rule against perpetuities does not prevent the giving of a life interest to an unborn person; for as persons not *in esse* at the death of the testator may be made devisees of the inheritance of lands or legatees of the absolute interest in personalty, they are of course equally competent to take life or other partial interests. In numerous cases the validity of a devise to an unborn person for life, though not forming the direct subject of consideration, was assumed in the discussion of some other question, without even an attempt being made to impeach the validity of the gift; a circumstance which strongly shows how general has been the acquiescence in the doctrine, *Doe* v. *Gunnis*, 4 Tau. 313; 13 R. R. 604; *Doe* v. *Vaughan*, 5 B. & Al. 464; *Ashley* v. *Ashley*, 6 Sim. 358; 38 R. R. 139; *Denn* v. *Page*, 3 T. R. 87, n.; 11 Ea. 603, n.; 1 R. R. 655, n.; *Foster* v. *Earl of Romney*, 11 Ea. 594; *Williams* v. *Teale*, 6 Ha. 250; 77 R. R. 108; *Hampton* v. *Holman*, 5 Ch. D. 183; 46 L. J. Ch. 248; 36 L. T. 287; *In re Roberts*, 19 Ch. D. 520; 45 L. T. 450. If, therefore, a testator stops at the creation of such life interests, his disposition is perfectly consistent with the rule of law; but if he goes on to give the remainder or ulterior interest to the issue of such unborn devisees or legatees for life, this part of the scheme fails. There is a rule which

**Notes to Prec. 18.**

existed long before the rule against perpetuities, and which prohibited what was termed a possibility upon a possibility, that is, a limitation of an estate to a child of an unborn person. This rule still exists independently of the rule against perpetuities, and therefore limitations of estates to a child of an unborn person, even though they may not offend against the perpetuity rule, are bad, *Hay* v. *Earl of Coventry*, 3 T. R. 83; 1 R. R. 652; *Monypenny* v. *Dering*, 2 D. M. & G. 145, 170; 95 R. R. 52; *In re Frost*, 43 Ch. D. 246; 59 L. J. Ch. 118; 62 L. T. 25; *Whitby* v. *Mitchell*, 44 Ch. D. 85; 59 L. J. Ch. 485; 62 L. T. 771. Thus, if a testator gives lands to A. for life, with remainder to his unborn children for life, remainder to the children of such children as tenants in common in fee, the devises to A. and his children will take effect, and the inheritance, which the ulterior devise purports to dispose of, will descend to the heir-at-law or residuary devisee of the testator. See also *In re Ashforth's Trusts*, '05, 1 Ch. 535; 74 L. J. Ch. 361; 92 L. T. 534.

Rule against perpetuities.

A gift over after a life interest to an unborn person is valid, if such gift over is in favour of a person who is within the perpetuity line or of a class necessarily ascertained within the limits of the rule, *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; 39 L. J. Ch. 729; 23 L. T. 442.

A devise to a person in being for life, then to the unborn children of such person in being, as tenants for life, and after the death of the longest liver of the tenants for life, upon such trusts as the longest liver should appoint, and in default of appointment to the testator's heir, gives the property after the death of the longest liver of the tenants for life to the testator's heir, the power of appointment being void, as the person to exercise it is not necessarily ascertainable within a life or lives in being and twenty-one years, *In re Hargreaves*, 43 Ch. D. 401; 59 L. J. Ch. 384; 62 L. T. 473; overruling *Avern* v. *Lloyd*, L. R. 5 Eq. 383; 37 L. J. Ch. 489; 18 L. T. 282, where a bequest to the unborn issue of a person in being, as tenants for life, and to the executors, administrators, and assigns of the survivor, was held not to be too remote, but to give an absolute interest to the survivor. A gift to testator's daughter for life, and on her death for such child or children of hers as should live to attain twenty-one years, and also for such child or children of any son of hers who should die under twenty-one, as should live to attain the age of twenty-one years, equally is void; and evidence that the daughter at the testator's death was past the age of child-bearing, which evidence, if admitted, would have made the gift valid, is not admissible, *In re Dawson*, 39 Ch. D. 155; 57 L. J. Ch. 1061; 59 L. T. 725; following *Jee* v. *Audley*, 1 Cox, 324; 1 R. R. 46; and *In re Sayer's Trusts*, L. R. 6 Eq. 319; 36 L. J. Ch. 350; 16 L. T. 203, in preference to *Cooper* v. *Laroche*, 17 Ch. D. 368; 43 L. T. 794.

In some instances devises of land which extend the limitations to too remote a line of issue are rendered valid by the doctrine of *cy près*, or approximation. According to this doctrine, if a testator devises lands to A. for life, with remainder to the eldest son (unborn) of A. for life,

*Cy près* doctrine.

**Notes to Prec. 18.**

with remainder to the first and other sons of such eldest son successively in tail, the Courts, in order to prevent the testator's intention in favour of the issue of the son of A. from being entirely defeated accelerate the ultimate limitation by giving the estate tail to the son himself, instead of to his son; thereby reducing the limitations to a devise to A. for life with remainder to his first and other sons in tail. It will be observed, that, under these modified limitations, the intended tenants in tail take by descent (supposing the estate tail to remain unbarred) similar estates to those which it was attempted to vest in them by purchase, *Nicholl* v. *Nicholl*, 2 W. Bl. 1159; *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781; 1 R. R. 467; see also *Hopkins* v. *Hopkins*, Ca. t. Talb. 44. It is clear that this doctrine does not extend to bequests of personalty, *Routledge* v. *Dorril*, 2 Ves. 357, 365; 2 R. R. 250; nor to gifts of real estate which would confer on the too remote issue estates in fee simple, *Bristow* v. *Warde*, 2 Ves. 336; 2 R. R. 235. It seems, however, to apply where they are made tenants in common in tail, *Pitt* v. *Jackson*, 2 Br. C. 51; *Vanderplank* v. *King*, 3 Ha. 1; 64 R. R. 186; see also *Williams* v. *Teale*, 6 Ha. 251; 77 R. R. 109. The doctrine, however, does not apply where the devise to the issue of the unborn person, instead of running through the whole line of sons, is restricted to the eldest son, as in such case the devolution of the estate under an entail (which would include all the sons), differs so widely from the destination contemplated by the testator, *Monypenny* v. *Dering*, 16 M. & W. 418; 7 Ha. 568; 2 D. M. & G. 145; 95 R. R. 52. See also *Hampton* v. *Holman*, 5 Ch. D. 183; 46 L. J. Ch. 248; 36 L. T. 287; *In re Richardson*, '04, 1 Ch. 332; 73 L. J. Ch. 153; 91 L. T. 169; *In re Mortimer*, '05, 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459.

Scheme by which the vesting of shares of unborn children may be postponed beyond majority.

The doctrine of the case of *Cadell* v. *Palmer*, 1 C. & F. 372, does not lead to any alteration in the ordinary form of gifts to unborn children, which are commonly made to confer vested interests at majority; but it affords the means of carrying into effect the designs of some testators, who are anxious to postpone the vesting to a later age. For instance, suppose a testator, distrustful of the prudence which ordinarily belongs to the legal age of discretion, is desirous to postpone the vesting of the shares of his grandchildren, born and unborn, until the age of twenty-five; a gift aiming directly and absolutely at this object would be void, *Leake* v. *Robinson*, 2 Mer. 363; 16 R. R. 168; *Bull* v. *Pritchard*, 1 Rus. 213; 25 R. R. 27; but the gift would be rendered valid by carving out a period composed of existing lives and twenty-one years, and restraining the vesting (as in the text) within the compass of such period. This expedient, while it preserves inviolate the rule of law, exposes the testator's scheme of postponing the vesting of the grandchildren's shares until their ages of twenty-five to very little actual risk of being frustrated, since several lives and twenty-one years are almost certain to outrun one of those lives (for the parent of the objects of the gift would of course be made one of the *cestuis que vie*) and twenty-five years.

**Notes to Prec. 18.**

One point of much interest in connection with the doctrine of the rule against perpetuities is as to the validity of indefinite powers of sale, *i.e.* powers which are so framed as not necessarily to be exercisable within the compass of a life in being and twenty-one years afterwards, and which, therefore, might seem to admit of the possibility of the estate being shifted in derogation of the limitations in the will or settlement for an unlimited period. The validity of such powers comes under consideration in the ordinary case of lands being limited by deed or will to a person for life, with remainder to his first and other sons in tail male, with remainders over. A power is reserved to A. and B., and the survivor of them, and the heirs of such survivor, with the consent of the tenant for life during his life, and after his decease in their or his own discretion, to sell the estate and revoke the uses in favour of a purchaser. As this power would appear from the absence of restriction to extend through all time, it might seem obnoxious to the rule against perpetuities; but the eldest son, as tenant in tail in remainder, being competent, with the concurrence of the tenant for life, to bar the entail and remainders, and thereby extinguish the power, the objection is at an end, *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Capron*, *ib.* 138, n.; *Waring* v. *Coventry*, 1 M. & K. 249; *Boyce* v. *Hanning*, 2 Cr. & J. 334; *Wood* v. *White*, 4 M. & C. 460; *Nelson* v. *Callow*, 15 Sim. 353.

As to the validity of indefinite powers of sale.

In none of these instances, however, was the ground of decision very distinctly intimated; but, as it always happened that the power had been exercised during the life estate, an opinion obtained in the profession, that powers of this nature were valid when exercised during the lifetime of the tenant for life, but invalid if not so exercised; such we may collect to have been the view of Lord Cottenham from his remarks in *Wood* v. *White*, 4 M. & C. 483. In *Lantsbery* v. *Collier*, 2 K. & J. 709, Sir W. Page Wood, V.-C., reviewed the authorities respecting powers of sale not restricted in terms as to time, and declared that the Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple is limited after estates for life or estates tail, will hold the power to be valid and subsisting until the estates tail (if any) are barred, or the fee simple vested in possession—in either of which events, the purpose of the settlement is at an end, and the power is determined, 2 K. & J. 722; see also *Wolley* v. *Jenkins*, 23 Be. 53; 26 L. J. Ch. 379; on appeal, 5 W. R. 281; *Taite* v. *Swinstead*, 26 Be. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. Ch. 845; *Peters* v. *Lewes and East Grinstead Railway Co.*, 18 Ch. D. 429; 50 L. J. Ch. 839; 45 L. T. 234; Sugd. Pow. 851; Jarm. Wills, 261. But where in a deed or will there is a limitation of real estate to one for life, and upon the death of the tenant for life upon trust to divide amongst certain persons, with power or authority to the trustees to sell, at such times as they shall think fit, all or any portions of such real estate, such power may be exercised within a reasonable time after the death of the tenant for life, and after the property has

Indefinite power of sale.

**Notes to Prec. 18.**

become absolutely vested in possession, if on the construction of the particular instrument it appears to be the intention of the settlor or testator that it should be then exercised, *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624; 51 L. J. Ch. 514; 46 L. T. 813; *Re Lord Sudeley and Baines & Co.*, '94, 1 Ch. 334; 63 L. J. Ch. 194; 70 L. T. 549; *Re Dyson and Fowke*, '96, 2 Ch. 720; 65 L. J. Ch. 791; 74 L. T. 759; *In re Horsnaill*, '09, 1 Ch. 631; 78 L. J. Ch. 331; 100 L. T. 603.

In *Re Daveron*, '93, 3 Ch. 421; 63 L. J. Ch. 54; 69 L. T. 752, where a testator directed certain real estate to be sold on the expiration of a lease which had forty-nine years to run at the date of his death (which power of sale was therefore clearly void), and that the proceeds thereof should be distributed among certain named persons, it was held that the legatees of the proceeds of sale were entitled to the property, inasmuch as they had the right in equity to elect to take the property as real estate. In such a case, if the property is sold under a decree of the Court, the proceeds of sale, for the purpose of transmission to the representatives of a deceased beneficiary, will be real and not personal estate, *Goodier* v. *Edmunds*, '93, 3 Ch. 455; 62 L. J. Ch. 649. See *In re Appleby*, '03, 1 Ch. 565; 72 L. J. Ch. 332; 88 L. T. 219.

In *In re Wood*, '94, 3 Ch. 381; 63 L. J. Ch. 790; 71 L. T. 413, a testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then to sell them and hold the proceeds on trust for certain persons to be then living. *Held*, that both the direction to sell and the trust of the proceeds were void for remoteness. It is to be noted that, in *Re Daveron*, *ubi sup.*, the persons entitled to the proceeds of sale were existing persons, whereas in *Re Wood*, the persons entitled to the proceeds of sale were not ascertainable within the period allowed by the rule against perpetuities.

Whether the objection of remoteness is applicable to a remainder.

In *Cole* v. *Sewell*, 4 Dr. & War. 1, affirmed 2 H. L. C. 186, Lord St. Leonard used language which was read as meaning that the rule against perpetuities did not apply if the limitation was by way of remainder. However, *In re Frost*, 43 Ch. D. 246; 59 L. J. Ch. 118; 62 L. T. 25, Kay, J., pointed out that such was not Lord St. Leonards' meaning, and held that the rule against remoteness is applicable to contingent remainders as well as to contingent limitations by way of executory devise.

See further, on the subjects of this note, the case of *Cadell* v. *Palmer*, and the notes thereto, in Tud. L. C. R. P.; Lewis on Perpetuity; Jarm. Wills, Ch. IX., section 2.

(*i*) See note (*f*), Prec. VI.

(*j*) See note (*g*), Prec. XII.

## No. XIX.

WILL *of a* TRADESMAN *bequeathing his Business to his Widow, and appointing her sole Trade Executrix.—Residue to Trustees, to convert and invest; Income to Wife during her Life; subject thereto, Capital to Children equally; the Issue of deceased Children taking their Parent's Share.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I GIVE and bequeath unto my wife [*name*] absolutely the business of a —— now carried on by me at —— and all the goodwill and stock in trade fixtures and effects which at the time of my death shall be employed by me therein and all moneys and debts which shall then belong and be due to me for or on account of the said business subject nevertheless to the payment of all my debts funeral and testamentary expenses And I appoint my wife sole executrix of this my will so far as relates to the property and assets which at the time of my death shall be employed in my said business I ALSO bequeath to my wife absolutely all the household furniture consumable stores and other effects which at the time of my death shall be in or about or belong to my then dwelling-house (*a*) I DEVISE all the real estate and I bequeath all the residue of the personal estate to which at the time of my death I shall be entitled or over which I shall then have any power of testamentary disposition unto and to the use of my wife and my two sons —— and —— their heirs executors administrators and assigns Upon trust to sell convert and get in my said real and residuary personal estate And to invest the moneys to arise from the sale conversion and getting in thereof in the names or name of the trustees or trustee for the time being of this my will (*b*) AND upon further trust to permit my wife to receive the annual income of the said moneys and investments during

Bequest of business, goodwill, &c., and household effects to widow.

Special executor.

Real estate and residue of personal estate to trustees;

—upon trust to sell and invest the proceeds;

—income to wife during her life;

**Prec. 19.**

—capital to children equally;

—issue of deceased child taking parent's share.

Appointment of executors and guardians.

her life And from and after her death upon trust for my children in equal shares And I declare that if any child of mine shall die in my lifetime and any child or children of such child of mine shall be living at my death the share to which each child of mine so dying would if living at my death have been entitled under the trust aforesaid shall be held in trust for the child or children of such child of mine who shall be living at my death and if more than one in equal shares I REVOKE all prior wills and codicils and appoint my wife and my said sons —— and —— executors of this my will (except as to my property embarked in trade) and guardians (*c*) of such of my children as at the time of my death shall be under the age of twenty-one years IN WITNESS &c.

**NOTES to Precedent XIX.**

(*a*) See note (*b*), Prec. XV.
(*b*) See note (*b*), Prec. IV.
(*c*) See note (*g*), Prec. XII.

## No. XX.

WILL *of a* TRADER; *Direction to Wife to carry on Business.—Trustees empowered to discontinue or carry it on in certain events, with provision for their remuneration while they carry it on.—Option to eldest, and, if he declines, then to the other Sons successively on attaining Twenty-one to take over Business.—Application of profits while Wife or Trustees carry on.—Real and Residue of Personal Estate to trustees to convert and invest.—Income thereof to Wife during widowhood charged with Maintenance of Children.—On her Death or Marriage capital to Children equally who attain Twenty-one.—If no Children or Issue attain Twenty-one to Testator's Brother.—Power of Advancement.—Power to Appoint Trustees.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name address and quality*] I APPOINT my wife during her widowhood and also —— of —— and —— of —— to be my executors and trustees I BEQUEATH £—— to each of the said —— and —— as some recompense for the trouble they may be put to such legacies to be in addition to any moneys they may be entitled to receive under the provisions of my will while they shall carry on my business as hereinafter provided I BEQUEATH to my son —— my collection of minerals and fossils with the cabinet in which they are placed I BEQUEATH to my son —— my bookcase and library of books except my copy of —— which together with my grand pianoforte by —— I BEQUEATH to my daughter —— I BEQUEATH to my son —— my guns fishing-rods and all my sporting appliances whatsoever I BEQUEATH to my wife my articles of jewellery wearing apparel wines and consumable stores household furniture linen china glass absolutely and the use of my plate and pictures during her widowhood an inventory thereof being taken

Appointment of executors and trustees.

Specific bequests.

**Prec. 20.**

as soon as convenient after my death of which my wife shall keep one copy and my executors another I BEQUEATH to my wife £—— to be paid immediately I DEVISE AND BEQUEATH to my trustees their heirs executors administrators and assigns all my real and the residue of my personal estate UPON TRUST to sell and convert into money such part thereof as at my death is not or as shall not under the trusts of my will be employed in my business of —— and to invest the proceeds (*a*) and to stand possessed of such investments upon the trusts hereinafter declared concerning the same I DESIRE that my wife shall carry on my said business during her widowhood until my eldest son —— or if he die or refuse my other sons successively shall attain the age of twenty-one years and for that purpose shall have the use and occupancy of all my real and personal estate which may be employed therein at my death the rents rates and taxes to which any part thereof may be subject being charged to the account of the said business with full power to manage the same at her discretion except as to the amount of capital to be employed therein which I AUTHORISE my trustees to increase out of the said investments or to diminish at their discretion And if my wife shall refuse to carry on the said business or shall marry or die before any of my sons shall in accordance with the provisions hereinafter contained be able or willing to carry it on I AUTHORISE my trustees other than my wife to discontinue or to carry on the same at their discretion so long as there shall be a son of mine under age and any moneys coming to their hands on the discontinuance or winding up for any reason and at any time of the said business shall form part of the residue of my personal estate AND I BEQUEATH to each of the said trustees other than my wife as long as they shall carry on the said business the annual sum of £—— to be retained by them out of the profits of the said business And whichever of my sons shall first after attaining his age of twenty-one years by writing under his hand inform my trustees of his desire to carry on the said business shall be entitled to the goodwill thereof and to the premises capital stock credits and effects employed therein and belonging thereto upon securing by his bond to my trustees payment within [*four*] years from the time of

Real and residue of personal estate on trust to convert and invest.

Direction to wife to carry on testator's business.

Trustees empowered to discontinue or carry on business in certain events.

Remuneration to trustees.

Option to sons successively to take over business.

declaring such option or such other period as my trustees may deem expedient of such a sum as shall be the difference between the sum to which such son may then be entitled under my will and the value of such premises and effects exclusive of the goodwill which he is to have without consideration to be ascertained by two valuers to be appointed one by such son and one by my trustees or their umpire and such bond shall form part of the residue of my personal estate [I DIRECT that so long as the said business shall be carried on by my wife or by my trustees the entire profits thereof, after the said payments (if any) to my trustees shall have been made thereout shall form part of the residue of my personal estate] (*b*) I BEQUEATH to my wife the income of the said investments so long as she shall continue my widow for her own use and the maintenance of my children And after her death or second marriage I bequeath the said investments to my children in equal shares But if any of them being a son or sons shall die under the age of twenty-one years or being a daughter or daughters shall die under that age without having been married then as to as well the share originally limited under the preceding trust as the shares eventually limited under this executory trust to any and every child so dying I BEQUEATH the same to the others or other of my children in equal shares And if there shall not be any child of mine who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married I BEQUEATH the said investments to my brother —— who shall be considered to have a vested interest therein as from my death I AUTHORISE my trustees if they think fit and notwithstanding my wife's life interest to apply not more than [*one-half*] of any child's expectant portion towards such child's advancement in life I DECLARE that there shall not at any time be more or less than two trustees of my will exclusive of my wife and that during her widowhood the power of appointing a new trustee or new trustees shall be exercisable by her IN WITNESS &c.

Profits of business to fall into residuary personal estate.

Trusts of investments representing real and residuary personal estate;

—income to wife during widowhood;

—on her death or marriage capital to children equally;

—if no children attain 21 years, to testator's brother.

Advancement of children.

Number of trustees and power to appoint new ones.

**NOTES to Precedent XX.**

(*a*) See note (*b*), Prec. IV.

(*b*) This clause should only be adopted where the income of the residue

**Notes to Prec. 20.**

of the testator's estate, apart from the business, is amply sufficient to maintain the widow and children. It will generally be found expedient to treat either the whole or a portion of the profits arising from the business as income. In such a case this clause might be worded as follows :—[I direct that so long as the said business shall be carried on by my wife or by the trustees *three fourth* parts of the net profits shall be treated as income and paid and applied in the same manner as income arising from the investments representing my residuary estate and the remaining *one fourth* part as capital forming an accretion to the *corpus* of my residuary estate] or [I direct that so long as the said business shall be carried on by my wife or by the trustees the whole of the net profits arising from the business shall be treated as income and paid and applied in the same manner as income arising from the investments representing my residuary estate].

## No. XXI.

WILL *of a* TRADER *carrying on Business alone and having an Infant Son and Daughters.—Appointment of Executors and Trustees.—Direction to Wife to carry on Business.—Option to Son of being employed in the Business at a Salary on attaining his Majority; and to take over Business on attaining Twenty-five Years.—Son then to pay Sum into Residuary Estate.—Power to Trustees to carry on Business on Death or refusal of Wife.—Application of Profits:* (1) *while Wife carries on* (a) *whole to her till Son Twenty-one,* (b) *then between Wife and Son till latter Twenty-five;* (2) *while Trustees carry on* (a) *Remuneration to them,* (b) *Balance while Wife alive as in* (1), *but on Wife's Death* (α) *to form part of Residue till Son Twenty-one,* (β) *then, till Son Twenty-five, part to fall into Residue and part to Son.—Power to Wife and Trustees to Sell the Business in certain events.—Application of Proceeds of Sale: part to fall into Residue, part to Son if he attains Twenty-one.—Wife entitled to Business, subject to certain Payments, on Son's refusal of it at Twenty-five.—On Purchase by Wife, Purchase-money to belong partly to Son, partly to Residue.—Residue of Real and Personal Estate on Trust for Sale, Conversion, Payment of Debts, and Investment.—Income to Wife for Life, she maintaining Children.—Then Capital to Children.—Son not to share if he has Business, but otherwise may do so on conditions.—Advancement of Children.—Power to Wife to appoint New Trustees.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name residence and quality*] I APPOINT my wife and —— and —— to be my executors and trustees I DIRECT that

Appointment of executors and trustees.

**Prec. 21.**

Wife to carry on testator's business.

my wife shall carry on the business of a —— now carried on by me until my son —— attains the age of twenty-five years and that for this purpose she shall have the entire use disposal and management of all the stock-in-trade fixtures and effects which at the time of my death shall be employed by me in the said business and of all moneys and debts which shall then belong and be due to me for or on account thereof I ALSO DIRECT that for the said purpose my wife shall have the use and occupation of all messuages shops and premises in which the said business shall at my death be carried on and that the rent if any and the rates and taxes payable in respect thereof shall be charged to the account of

Option to son of being employed in the business on attaining his majority.

the said business I FURTHER DIRECT that if within one month after my son attains the age of twenty-one years he shall express in writing to my wife if she shall be then carrying on the said business or if not then to my other trustees if they shall be carrying on the said business under the powers hereinafter contained (and I direct that she or they as the case may be shall give him one month's previous notice in writing of his power so to do) a desire to be employed in the said business she or they shall employ him therein in any position she or they may think fit and shall pay him in respect of his services a yearly salary of £—— at the least payable quarterly on the usual quarter

Option to son to take over business on attaining 25 years.

days AND I DIRECT that if my son shall within one month after he attains the age of twenty-five years express in writing to my wife or to my other said trustees (whichever of them shall be then carrying on the said business) his wish to take over and carry on the said business he shall have and be entitled to the same with the goodwill thereof and the stock-in-trade fixtures effects money and debts then employed in or owing in respect thereof and the messuages shops and premises in which the said business shall then

On son taking over business to pay sum into residuary estate.

be carried on PROVIDED that before taking over the said business he shall give security by bond or otherwise at his own expense to the satisfaction of my trustees for the payment to them at such times and by such instalments as to them shall seem proper of the sum of £—— which sum shall form part of my residuary estate In the event of my

**Prec. 21.**

wife refusing or ceasing to carry on the said business as aforesaid or in the event of her death before my son attains the age of twenty-five years I DIRECT my trustees other than my wife to carry on the same (*a*) and for that purpose I give them the same powers and rights as are hereinbefore conferred on my wife for that purpose I DECLARE that as long as the said business shall be carried on by my wife the annual profits thereof until my son attains the age of twenty-one years shall belong to her and that thenceforth until my son attains the age of twenty-five years they shall be divided as follows namely to my wife [*three-fourth*] parts thereof and to my son [*one-fourth*] part thereof such [*one-fourth*] part to be in addition to the said salary payable in respect of his services but the receipt of such [*one-fourth*] part shall not constitute him a partner in the said business (*b*) I DECLARE that each of the said trustees other than my wife as long as he shall act in the carrying on of the said business shall be entitled to retain out of the annual profits for his own use [*one-eighth*] part thereof And the balance of the said profits shall be applied in the manner hereinbefore provided for the application of the profits of the said business as long as the same is carried on by my wife But in the event of my wife dying before my son attains the age of twenty-one years I DIRECT that the said balance until my son attains that age shall form part of my residuary estate And that In the event of my wife dying at any time before my son attains the age of twenty-five years the said balance accruing in each year after my wife's death and after my son attains the age of twenty-one years until he attains the age of twenty-five years shall be divided as follows namely [*three-fourth*] parts thereof shall form part of my residuary estate and [*one-fourth*] part thereof shall belong to my son such [*one-fourth*] part to be in addition to the salary payable in respect of his services as hereinbefore provided but the receipt of such [*one-fourth*] part shall not constitute him a partner in the said business I DECLARE that in the event of my wife refusing or ceasing to carry on the said business my said trustees other than my wife may if it should seem desirable to them in the interest of my son and in the event

Power to trustees to carry on business on death or refusal of wife.

Application of profits:
(1) while wife carries on business,
(a) whole to wife till son 21;
(b) then between wife and son till latter 25;
(2) while trustees carry on business,
(a) remuneration to trustees;
(b) balance while wife alive, as in (1);
—on wife's death,
(*a*) to form part of residue till son 21;
(*β*) then till son 25 part to fall into residue, part to son.

Power to wife and to trustees to sell the business in certain events.

**Prec. 21.**

of my wife dying before my son attains the age of twenty-five years or of my son within one month of his attaining that age not expressing in writing any desire to take over and carry on the said business my wife if she shall then be carrying on the said business and if not then the said trustees other than my wife shall as soon as possible sell the goodwill of the said business and the stock-in-trade fixtures effects messuages shops and premises and shall get in the moneys and debts which may be employed in or owing in respect of the said business at the time of such sale and getting in I DIRECT that the moneys to arise from such sale and getting in shall as to [*one-half*] thereof form part of my residuary estate and as to the other [*half*] shall belong to my son if he attains the age of twenty-one years but if he does not attain that age shall also form part of my residuary estate PROVIDED that if my wife shall be carrying on the said business when my son attains the age of twenty-five years she shall on my son not expressing any desire as aforesaid to take over the same be entitled to the said business and the goodwill thereof and the stock-in-trade fixtures effects moneys and debts then employed in or owing in respect thereof and the messuages shops and premises in which the said business shall then be carried on on giving security by bond or otherwise at her own expense to the satisfaction of the said trustees other than my wife for the payment to them at such times and by such instalments as to them shall seem proper of a sum representing the value of the same (with the exception of the goodwill which she shall be entitled to without payment) such value to be ascertained by two competent and independent valuers one appointed by herself and the other by my said trustees other than my wife and the said sum shall be divided as follows namely one [*half*] thereof shall form part of my residuary estate and the other [*half*] shall belong to my son I DEVISE AND BEQUEATH the residue of my real and personal estate to my trustees on trust to sell and convert the same into money and thereout in the first place to pay my debts funeral and testamentary expenses and to invest the remainder (*r*) and to pay the income of such investments

Application of proceeds of sale of business, part to fall into residue, part to son if he attains 21.

Wife entitled to business on conditions on son's refusal to carry on at 25.

On purchase of business by wife, part of purchase-money to belong to son, part to fall into residue.

Devise and bequests of

to my wife for her life she thereout maintaining educating and bringing up in a manner suitable to their station in life my son until he attains the age of twenty-one years and my daughters until that age or marriage and also maintaining such of my daughters as being of that age shall not be or have been married And on the death of my wife I BEQUEATH the said investments to such children of mine then living and such issue then living of my children then dead as being males shall either before or after the death of my wife attain the age of twenty-one years or being females shall either before or after the same period attain that age or be married as tenants in common in a course of distribution according to the stocks and not to the number of individual objects and so that the issue of a deceased child may take as tenants in common by way of substitution the share only which their parent would if living have taken PROVIDED ALWAYS that if my son shall have taken over the said business on his attaining the age of twenty-five years he shall not be entitled to any share in the said investments but if he shall not have taken over the said business as aforesaid he shall be entitled to share in the said investments only if he shall bring into hotchpot any sum of money he may receive under the provisions hereinbefore contained as representing the [*one-half*] part of the proceeds of the sale and getting in of the said business with the goodwill thereof and the stock-in-trade fixtures effects moneys and debts appertaining thereto or employed in or owing in respect thereof at the time of such sale or getting in or as representing the [*one-half*] of the sum payable after valuation on the said business being carried on by my wife after my son attains the age of twenty-five years as aforesaid I EMPOWER my trustees to apply after the death of my wife or during her life with her consent in writing any part not exceeding [*one-half*] of the capital of the contingent shares of the respective children and issue aforesaid in or towards their respective advancement in life I DECLARE that a new trustee or trustees of my will may from time to time be appointed by my wife and subject as aforesaid in the manner prescribed

residue of real and personal estate on trust for sale and conversion to pay debts and invest.

Income to wife for life, she maintaining, &c., children.

On death of wife, capital to children.

No share of residue to son if he has business.

If business wound up son may share on conditions.

Advancement of children.

Appointment of new trustees.

**Prec. 21.** by law but the number of trustees exclusive of my wife shall not exceed two LASTLY I REVOKE all prior wills and codicils IN WITNESS &c.

**NOTES to Precedent XXI.**

(*a*) See note (*a*), Prec. XXIII.

(*b*) On the question of determining whether a partnership exists or not, the Partnership Act, 1890 (53 & 54 Vict c. 39), s. 2, provides, *inter alia*, that the receipt by a person of a share of the profits of a business shall be *primâ facie* evidence that he is a partner; but that the receipt of such share, or of a payment contingent on or varying with the profits of a business shall not of itself make him a partner; and in particular, that a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business shall not of itself make the servant or agent a partner in the business or liable as such; also, that a person being a widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, shall not by reason only of such receipt be a partner in the business or liable as such.

(*c*) See note (*b*), Prec. IV.

## No. XXII.

WILL *of a* TRADER *carrying on business alone, and having two Infant Sons and also Daughters.—Appointment of Trade Executors and Substitution of Others on Death, &c., of those first Appointed.—Sons to become Trade Executors on attaining their Majority.—Bequest of Business to Trade Executors on Trust to carry it on until Sons attain Majority or Die before then, being the Time of Distribution.—Application of Profits of Business by Trade Executors:* (1) *Remuneration for carrying it on;* (2) *Annuity to Wife;* (3) *Investment and Accumulation of Remainder.—Power to resort to Investments of Profits if further Capital required, or in case of Deficiency of Profits in any Year.—If not resorted to, to become Part of Residuary Estate.—Trade Executors to offer Business when Sons attain their Majority* (1) *to Sons jointly;* (2) *to Elder Son;* (3) *to Younger Son;* (4) *in case Offers refused, Business to be Sold and for this purpose Trade Executors may form Limited Liability Company.—Means Provided for Forming and Bringing out a Company.—Immunity of Trade Executors if Company prove Abortive.—Moneys arising from Sale of Business to form part of Residuary Estate.—Exemption of Legacies from Duty.—Bequest of Plate, Furniture, &c., to Wife absolutely.—Devise and Bequest of Real and Residue of Personal Estate to Trustees on Trust to Sell and Convert, and to pay Debts, &c., and Legacies, and to Invest Remainder to form an Aggregate Fund.—Annuity out of Fund to Wife for Life, Balance for Children and Issue of Testator living at time of Distribution, and, if none, to Legatees named who take Vested Interests at Testator's Death.—Provision for Advancement of Testator's Children and*

**Prec. 22.**

*Issue.—Appointment of Executors and Trustees, and Bequest to such of them as act.—Revocation of prior Wills, and Appointment of Guardians of Testator's Children.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I APPOINT the following persons (hereinafter called my trade executors) namely A. B. of &c. and C. D. of &c. and my two sons —— and —— as and when each shall attain the age of twenty-one years to be executors of this my will so far as regards the machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and leasehold premises which at my death shall be employed in or connected with the trade or business of —— now carried on by me at —— under the style of —— AND I DECLARE that on the death or refusal to act or to continue to act or on the incapacity to act from any cause of either the said A. B. or C. D. I APPOINT successively —— of &c. —— of &c. —— of &c. a trade executor in the place of the trade executor so dying or refusing or becoming incapable to act (*a*) And I FURTHER DECLARE that in case any person hereinbefore appointed or nominated as a trade executor shall become bankrupt at any time after the date of this my will he shall at once become incapable to act as one of my trade executors I BEQUEATH all the said machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and leasehold premises to my trade executors UPON TRUST to carry on my said business until both of my sons attain the age of twenty-one years or the survivor of them attains that age or dies under that age and from and after the determination of that period (the time of which determination is hereinafter referred to as the time of distribution) for such further period as may by them be found necessary to effect the sale transfer or winding up of the said business as hereinafter provided I DIRECT that my trade executors shall apply the profits of the said business until sale transfer or winding up as follows First in the payment to each of themselves while acting as my trade executors of the annual sum of £—— Secondly until the time of distribution

Appointment of trade executors; sons to become such on attaining their majority.

Substitution of trade executors on death, &c.

Bequest of testator's business to trade executors, on trust to carry it on until sons attain majority or die before then.

Application of profits of business by trade executors: (1) Remuneration for carrying it on;

**Prec. 22.**

in the payment to my wife of the annual sum of £—— she suitably maintaining educating and bringing up my sons during infancy and my daughters until the time of distribution or marriage before that time Thirdly the surplus profits of each year until the time of distribution shall be invested (*b*) and the income of such investment and of any invested income shall be invested in like manner But I declare that if my trade executors shall at any time before the time of distribution require more capital for the said business than that which shall at my death be employed therein or the profits of any year shall be insufficient to make the payments to my trade executors and to my wife hereinbefore directed my trade executors may resort to the said investments of profits and income for such additional capital or to supply the deficiency as they may think fit and if in any year the profits shall prove insufficient to make the aforesaid payments and there shall not be in the hands of my trade executors any such investments as aforesaid they may apply any surplus profits in any subsequent year down to the time of distribution to make up the deficiency of any previous year AND I DIRECT that subject to the said annual payment to my trade executors until the sale transfer or winding up of the said business the whole of the profits accruing after the time of distribution and any moneys arising in any way from my said business and herein not otherwise disposed of shall be paid to the trustees hereinafter named of this my will as part of the capital of my residuary personal estate I FURTHER DIRECT that within one month after the time of distribution my said business including the machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and the leasehold premises employed in or connected therewith shall be offered at the value set upon the same in the stock book of the said business at the last stock-taking if such stock-taking shall have taken place within twelve months before the time of distribution but if not then at a value to be determined by a competent and indifferent valuer appointed by my trade executors to my sons jointly in the first place but in case they shall not within one month after the offer signify their desire to purchase jointly then the same shall

(2) annuity to wife;
(3) investment and accumulation of remainder.

Power to resort to investments of profits if trade executors require further capital, or in case of deficiency of profits in any year.

Investments of profits not otherwise applied to be paid to trustees and become part of testator's residuary estate.

Trade executors to offer business when sons attain their majority:
(1) to sons jointly;
(2) to elder son;
(3) to younger son;
(4) in case offers refused, business to be sold, and for this purpose trade executors

**Prec. 22.**

may form limited liability company.

within seven days after the expiration of such month be offered in the second place to my elder son and in case he shall not within one month after the offer to him signify his desire to purchase then the same shall within seven days after such last month be offered in the third place to my younger son and in case he shall not within one month after the offer to him signify his desire to purchase then my trade executors shall as soon as possible after the time of distribution adopt such steps as they may think fit for disposing of the said business as a going concern either by private sale or to a company or by the formation of a company with liability limited by shares to take over the said business and they may in their discretion accept payment of the purchase-money in instalments extending over not more than five years and in the case of a sale to a company either in cash or fully paid shares or partly in one way and partly in the other I DECLARE that should my trade executors resolve to form a company with limited liability as aforesaid they may apply any sum which they may consider necessary not exceeding £—— to form and publicly bring out the said company such sum to be made up out of the said investments of surplus annual profits and income in their hands but should there not be any or not sufficient of such investments in their hands to make up the required sum they shall be entitled to receive from the trustees hereinafter named of this my will out of the aggregate fund hereinafter provided for and the accumulations thereof such sum as together with the said investments will make up the required sum PROVIDED ALWAYS that should the said company after it has been formed and brought out be unable and fail to carry out any contract or modified contract entered into for the sale to it of my said business my trade executors shall not be accountable for any loss to my estate occasioned by reason of such failure or of the said company proving abortive and thereafter they shall still have full power to sell the said business and goodwill privately as hereinbefore provided or to wind up the same as they shall deem advisable I DIRECT that the moneys or shares to arise from the sale transfer or winding up of my said business shall be paid or transferred by my trade executors to

Provision of means for forming and bringing out company to purchase business.

Immunity of trade executors if company prove abortive.

Money arising from sale of business to form part of testator's residuary estate.

my trustees hereinafter named as part of the capital of my residuary personal estate and that my said trustees may retain any shares so transferred to them and need not sell and convert the same I DECLARE that every legacy hereinafter bequeathed is bequeathed free of legacy duty I BEQUEATH to my wife all my plate plated articles furniture linen glass china pictures prints musical instruments books and other articles of household use or ornament (*r*) horses carriages saddlery harness and stable furniture tools wines and liquors I BEQUEATH to my wife the sum of £—— to be paid to her within one calendar month after my death I BEQUEATH to —— the sum of £—— I DEVISE AND BEQUEATH all my real estate and the residue of my personal estate UNTO AND TO THE USE of —— and —— their heirs executors administrators and assigns (herein called my trustees) UPON TRUST to sell call in and convert into money the said real and personal estate And out of the net proceeds of such sale calling in and conversion to pay my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the legacy duty on the same and to invest the residue of the proceeds of such sale and conversion in their names and I DECLARE that all such investments shall form an aggregate fund which shall be retained by them until the time of distribution and that they shall in the meanwhile invest the income of such investments and of the invested income of such investments so as to accumulate at compound interest until the time of distribution and thenceforth shall hold the said aggregate fund and the accumulations thereof UPON TRUST after paying all expenses incident to the trusts hereby created to pay to my wife during her life the yearly sum of £—— and to pay to my trade executors such sum as the latter may under the provisions hereinbefore contained be entitled to require from my trustees in order to make up the said sum £—— for the purposes of forming and bringing out a company to take over my said business and subject to such payments UPON TRUST for my children living at the time of distribution and the issue then living of my children dying before that time such objects to take as tenants in common according to the stocks and not to the

Exemption from legacy duty.

Bequest of plate, furniture, &c., to wife absolutely.

Devise and bequest of real and residue of personal estate to trustees, on trust to sell and convert and to pay debts, &c., and legacies, and to invest remainder to form aggregate fund.

Annuity out of aggregate fund to wife for life, balance for children and issue of testator living at time of distribution, and if none to legatees named, who take vested interests at testator's death.

**Prec. 22.**

number of individuals composing the class the shares of my sons to be payable immediately and of other issue being males at the age of twenty-one years and of my daughters and of other issue being females at that age or marriage and if there shall not be any object of the same trust or not any such object who shall become entitled to an absolutely vested interest therein then as to my trust fund UPON TRUST for —— if he shall be living at the failure of the preceding trusts in favour of my children and their issue for his absolute use But if he shall not be then living UPON TRUST in equal shares for —— and —— who shall be deemed to have vested interests in their respective shares on my death PROVIDED ALWAYS that it shall be lawful for my trustees at any time or times before the time hereinbefore fixed for payment to my children or their issue of their shares to apply in or towards the advancement in the world of each of my sons or to each male grandchild or more remote issue any part not exceeding [*one-half*] of the principal of his share and to each of my daughters or to each female grandchild or more remote issue any part not exceeding [*one-half*] of the principal of her share AND I DECLARE that the sums to be advanced to my children or their issue as aforesaid shall be taken in part satisfaction of the shares of my trust fund to which my children or their issue may respectively become entitled I APPOINT the said [*trustees' names*] to be executors of this my will (except as to my property hereinbefore bequeathed to my trade executors) AND I BEQUEATH to each of my said executors and trustees (other than my trade executors) who shall prove my will and accept the trusts thereof the sum of £—— I REVOKE all prior wills and codicils and appoint my trustees to be guardians of such of my children as at the time of my death shall be under the age of twenty-one years IN WITNESS &c.

Provision for advancement of testator's children and issue.

Appointment of executors and trustees and bequests to such of them as act.

Revocation of prior wills, and appointment of guardians of testator's children.

**NOTES to Precedent XXII.**

Substitution on death of executor.

(*a*) That a testator may nominate a person to be an executor of his will in case of the death of one of the persons previously appointed to that office, and that such substituted executor will be entitled to probate, whether the death of the executor for whom he is substituted take place

**Notes to Prec. 22.**

before or after the death of the testator, see *In b. Johnson*, 1 Sw. & Tr. 17; 27 L. J. P. 9; *In b. Foster*, L. R. 2 P. & D. 304; 41 L. J. P. 18; 25 L. T. 763; and see *In b. Day*, 14 Jur. 490 for a conditional appointment of executor; *In b. Lane*, 4 N. R. 253, for an alternative appointment; and *In b. Langford*, L. R. 1 P. & D. 458; 37 L. J. P. 20; 17 L. T. 415, for a substituted appointment in case of absence.

Power of appointing new executors.

Executors may, under a power for that purpose contained in the will, keep up the number of executors by fresh appointments from time to time; and the new executors so appointed will be entitled to probate, *In b. Deichman*, 3 Cur. 123.

(*b*) See note (*b*), Prec. IV.

(*c*) See note (*b*), Prec. XV.; and (*b*), Prec. XXV.

**Prec. 23.**

## No. XXIII.

WILL *of a* TRADER *disposing of Real and Personal Estate in favour of his Wife and Children.—Property vested in Trustees, with directions to sell the Real Estate, and to carry on Trade.—Wife, during Widowhood, to have the Use and Occupation of Testator's House and Furniture, and to receive the Income of the Trust Estate, maintaining and bringing up the Children.—Portions to be raised for Children requiring Advancement during her Widowhood.—On her Death or Marriage, the Capital to be distributed among the Children.—Directions for Advancement.—Powers to employ Accountants, &c.; to appoint Trustees.—Appointment of Executors and Guardians.*

Devise of real and personal estate to trustees;

—to sell real estate after wife's death or marriage, or sooner with her consent;

—to pay debts, &c., out of personalty not employed in trade;

—to permit wife to carry on trade and

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name and description*] I DEVISE AND BEQUEATH all the real and personal estate which shall belong to me at my death unto —— and —— [*trustees*] UPON TRUST to dispose thereof according to the directions hereinafter contained (that is to say) I DIRECT that my trustees shall at such time or times after my wife [*name*] shall die or marry again as having regard to the destination of my trust property under this my will they shall judge expedient or during her widowhood with her written consent sell my real property and invest the produce I DIRECT that my debts and funeral and testamentary expenses shall be paid as soon as may be out of such parts of my personal estate as shall not be required to answer the direction next hereinafter contained I DIRECT that my trustees shall permit my wife she continuing my widow to carry on the trade or business (*a*) in which I shall be engaged at my death and to use and employ for that purpose such part of my real and personal estate as shall be then used or employed therein with power for my trustees to increase or diminish at

**Prec. 23.**

their discretion the real and personal estate so used or employed and in the event of her dying marrying or declining to carry on such trade or business then my trustees if they shall think fit may in like manner carry on the same for such period as having regard to the directions hereinafter contained concerning my trust property they shall judge expedient I DIRECT that my trustees shall permit my wife she continuing my widow personally to occupy as her residence the messuage wherein I now reside at —— aforesaid with the appurtenances and to use therein my household furniture and effects plate linen china and consumable stores she keeping the said messuage in repair and paying the expense of insuring the same from loss or damage by fire and also the taxes and other outgoings affecting the same I DIRECT that subject to the previous dispositions my trustees shall sell and convert my personal property not consisting of moneys invested in stocks funds or securities yielding income (other than personal securities) and shall at their discretion either get in the moneys invested as last aforesaid or permit the same to continue so invested and shall invest the produce of the trust property so converted or gotten in I DIRECT that my trustees shall permit my wife she continuing my widow to receive from my death the net annual income actually produced by my trust property howsoever constituted or invested and whether yielding more or less than the ordinary rate of interest including a proportion of the payments accruing due at my death whether ordinarily apportionable or not and including the profits of my trade or business if carried on pursuant to the direction hereinbefore contained I DIRECT that my wife during her widowhood shall out of the income to be received by her pursuant to the last clause maintain educate and bring up my children being sons until the age of twenty-one years and being daughters until that age or marriage (*b*) and shall also maintain such of my daughters as being of that age shall not be or have been married but my trustees shall not be obliged to see this direction fulfilled And that if any of my children being sons shall attain the age of twenty-one years or being daughters shall be married during the widowhood of my wife then it shall be lawful for my trustees but subject to the

employ real and personal estate: if she die, marry, or decline, trustees may carry it on.

Trustees to permit wife to occupy house and use furniture, &c.

Trustees to convert personal estate not invested in stock, &c., and to call in or continue such investments;

—to permit wife during widowhood to receive income of real and personal estate.

Wife to maintain infant sons and unmarried daughters.

Trustees to advance sons coming of age and daughters marrying during wife's widowhood.

**Prec. 23.**

specific dispositions hereinbefore contained to raise by such means as they shall judge expedient out of my trust property for each such child any sum not exceeding £—— to be applied towards his or her advancement in life in such manner as my trustees shall think most beneficial and to be accounted for by such child on the distribution of my trust property pursuant to the direction hereinafter contained I DIRECT that subject to the preceding directions my trustees shall hold my trust property for the absolute use of my child if only one or all my children equally if more than one who either before or after my death being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be married (*c*) I DIRECT that my real estate shall be considered for the purposes of enjoyment and transmission under the trust declared by the last clause as converted into personal estate from my death I DIRECT that my trustees shall have power in their discretion after the death or marriage of my wife to raise by such means as they shall judge expedient out of my trust property any part not exceeding one-half of the principal or value of the contingent portion of each child and apply the same for his or her advancement in life AND subject to the provision for advancement hereinbefore contained my trustees shall after the death or marriage of my wife invest and continue invested in their names the contingent portions of my children (*d*) I DIRECT that my trustees may employ bailiffs collectors clerks accountants and servants in collecting debts and rents (*e*) and otherwise in the administration of my trust property and in making out and keeping the accounts thereof with such salaries and allowances as they shall think reasonable I DIRECT that my trustee [*name*] whether he shall accept the trusteeship or not shall be the solicitor (*f*) to my trust property and as such notwithstanding his acceptance of the trusteeship be allowed all professional and other charges for his time and trouble which if employed as solicitor to my trustees not being himself a trustee he would be entitled to make (*g*) I DIRECT that any person herein appointed or to be appointed a trustee who shall cease to be resident in the town of —— or within —— miles from the parish church [*or* town-hall] thereof (*h*) shall cease to be

Real and personal property (subject to preceding directions) to be in trust for sons attaining twenty-one, and daughters attaining twenty-one or marrying, equally.

Unsold real estate impressed with the quality of personalty.

Trustees may, after death or marriage of wife, advance children out of their expectant shares.

Trustees, after death or marriage of wife, to invest contingent portions.

Power to employ bailiffs, &c.

One of the trustees, a solicitor, to be allowed to act and charge as such.

Trustees to reside within certain limits; appointment of new trustees.

Prec. 23.

a trustee and that any and every vacancy in the trusteeship of my will shall be supplied as soon as may be by the appointment of a fit substitute resident as aforesaid such appointment to be made by my wife during her widowhood and after her death or marriage in the manner prescribed by law (*i*) I APPOINT my friends [*names &c.*] to be trustees and executors of my will And I appoint my wife she continuing my widow and after her death or marriage the trustees or trustee for the time being of my will to be guardian or guardians of the persons and fortunes of my infant children (*j*) I REVOKE all prior wills and codicils IN WITNESS &c.

Appointment of trustees, executors, and guardians.

**NOTES to Precedent XXIII.**

(*a*) An executor or administrator is not justified in continuing the testator's or intestate's trade, without an express authority; but an executor is justified in keeping a trading establishment on foot merely for the purpose of completing orders given in the testator's lifetime, or of disposing of the stock and goodwill to advantage, *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J. Ch. 159; *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; *Dakin* v. *Cope*, 2 Rus. 170; 26 R. R. 37.

As to executor carrying on trade.

Owing to the personal risks which an executor who carries on his testator's business incurs, it is obviously not to be assumed as a matter of course that every person who might be willing to undertake the ordinary duties of the office would be disposed to subject himself to the risks inseparable from carrying on a trade: and wills, therefore, containing a direction for the carrying on of the testator's trade ought to provide against the event of the executor declining to do so, and should also authorise him, if he should commence the undertaking, to relinquish it at any time; since a person may otherwise be induced to renounce the executorship, altogether, as the only means of escaping from the hazards which the testator has annexed to the office.

Though the entire property of the executor himself is liable to the engagements of the trade, yet that of the testator, it seems, is liable only so far as he has subjected it. If the will authorises the employment of his whole property in the trade, the whole thereby becomes subject to its engagements. But if the testator has limited the capital of the trade to a certain amount, or to property of a particular description, then this appropriated part will be liable in exclusion of the general assets; and if an executor, without any authority from the will of the testator, takes upon himself to trade with the assets, the testator's estate will not be liable, in the event of the executor's bankruptcy, *Cutbush* v. *Cutbush*, 1 Be. 184; *Ex parte Garland*, 10 Ves. 110; 7 R. R. 352; *Ex parte Richardson*, 3 Mad. 138; 18 R. R. 204; *Thompson* v. *Andrews*, 1 M. &

As to the quantum of capital which may be employed.

**Notes to Prec. 23.**

K. 116; *Labouchere* v. *Tupper*, 11 Moo. P. C. 198; 5 W. R. 797. And if the executor employs a larger sum than his testator has authorised, the excess, in the event of the executor becoming bankrupt, may be proved as a debt under the bankruptcy, *Ex parte Garland*, 10 Ves. 110; 7 R. R. 352; *Re Butterfield*, De G. 319; 11 Jur. 955. Where a testator directed generally that his executors should be his successors, for the benefit of his estate, in a business carried on by him in partnership, Sir J. Leach, V.-C., was of opinion that an executrix carrying on the business was not justified in employing more of the assets than the actual capital, *Ex parte Richardson*, 3 Mad. 138; 3 Mad. 138; 18 R. R. 204. It seems that in general the creditors of the trade, who have become such since the death of the testator, as such, have no claim against assets in the hands of legatees, among whom distribution has been made under the direction of the same will which has authorised the trade to be carried on (*ib.*). If any pecuniary remuneration is intended to be made to executors for their trouble in carrying on the trade, the testator should expressly authorise it; since otherwise this, like all the other duties of the office, must be performed gratuitously, *Burden* v. *Burden*, 1 V. & B. 170; 12 R. R. 210; though, if an executor employs a third person to conduct the trade, he will be allowed the salary paid to such person. It seems, too, that the Court will, upon a proper application, make a prospective allowance to an executor for any extra trouble of this nature. If a testator appoints trustees to carry on his business and directs that while they are carrying it on each shall receive an annual sum out of the profits thereof, the sums received by the trustees are legacies and liable to legacy duty, *In re Thorley*, '91, 2 Ch. 613; 60 L. J. Ch. 537; 64 L. T. 515. If the testator intends the sum to be a clear yearly sum, he should therefore make proper provision for this in the will.

Executor carrying on trade.

As to the indemnity which executors who carry on the testator's business under the authority of the will, and with the assent of the creditors, are entitled to, see *Dowse* v. *Gorton*, '91, A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809.

(*b*) As to a claim on the income after the attainment of majority, see *Badham* v. *Mee*, 1 R. & M. 631; 32 R. R. 304; *Carr* v. *Living*, 33 Be. 474; and *Leigh* v. *Leigh*, 12 Jur. 907; 84 R. R. 874, where the gift of the income of the residue to the wife during widowhood was not cut down by force of its being a gift for the bringing up, maintenance, and education of children, or by a subsequent gift to the children at twenty-one or marriage. See also *Browne* v. *Paull*, 1 Sim. N. S. 92; 89 R. R. 31; *Jodrell* v. *Jodrell*, 14 Be. 397; *Re Saunderson's Trust*, 3 K. & J. 497; *Re Booth*, '94, 2 Ch. 282; 63 L. J. Ch. 560.

Maintenance of adults.

(*c*) It is always to be remembered that a trust framed in the usual manner in favour of males who attain majority, and females who attain majority or marry, leaves unprovided for the case of a male marrying and dying during minority leaving issue—an event certainly not far removed from probability. Unless the testator deliberately chooses, in

such a case to subject the issue to the hardship of absolute exclusion, by way of check on the imprudence of early marriages, it would seem proper to make the shares of the entire class (including both male and female objects) vest at twenty-one or marriage.

(*d*) See note (*b*), Prec. IV.

As to the employment by an executor of a collector of debts.

(*e*) Where the debtors or tenants of a testator are numerous or widely scattered, it is not to be expected that an executor or trustee should personally employ himself in the collection of the debts or rents; and in all cases where, from the circumstances, it is necessary for the executors to employ agents, the executors may do so, and will be allowed the expenses of so doing, but as a general rule they are not allowed to employ an agent to perform those duties, which, by accepting the office of executors, they have taken upon themselves, *Weiss* v. *Dill*, 3 M. & K. 26. As the amount of the allowance made by executors to agents and for which they claim reimbursement out of the estate is sometimes disputed, a clause such as that in the text may be found useful.

No allowance to trustee for his trouble.

(*f*) The rule that a trustee, executor, or administrator shall have no allowance for his care and trouble extends to professional services, so that a solicitor can charge his *cestui que trust* only for costs out of pocket, *New* v. *Jones*, 1 M'N. & G. 668, n.; *Moore* v. *Frowd*, 3 M. & C. 45; *Bainbrigge* v. *Blair*, 8 Be. 588; neither can the partner of a solicitor-trustee charge for his services, *Collins* v. *Carey*, 2 Be. 128; *Christophers* v. *White*, 10 Be. 523. But the costs of a town agent in a cause are allowed, *Burge* v. *Brutton*, 2 Ha. 373; and a trustee, though he is a solicitor, may employ another solicitor to transact for him professional business relating to the trust, *Stanes* v. *Parker*, 9 Be. 389. See further as to solicitor-trustees, *York* v. *Brown*, 1 Col. 260; *Re Wyche*, 11 Be. 209; *Cradock* v. *Piper*, 1 M'N. & G. 664, as to which see *Manson* v. *Baillie*, 2 Macq. 82, 91; *Lincoln* v. *Windsor*, 9 Ha. 158; *Broughton* v. *Broughton*, 5 D. M. & G. 160; *Lyon* v. *Baker*, 5 De G. & S. 662; *Pollard* v. *Doyle*, 1 Dr. & S. 319.

It would seem from the above cases that the case of a solicitor-trustee, acting in litigious business on behalf of himself and his co-trustees, forms an exception to the general rule.

Solicitor-executor.

So also, where a solicitor is appointed executor, and he accepts the office, he must perform all the duties thereof without remuneration: even if authorised by the will to charge for "professional services," he cannot charge for the performance of those services which ought to be rendered by an executor in a lay capacity, but is entitled to remuneration only for such services as are strictly "professional," *Harbin* v. *Darby*, 28 Be. 325; 29 L. J. Ch. 622; 2 L. T. 531. It will be seen, however, that the form in the text provides that proper remuneration shall be made for services generally, and not only for such as are strictly professional. See *In re Ames*, 25 Ch. D. 72.

(*g*) The solicitor-trustee must not attest the will, otherwise he will be precluded from charging profit costs, *In re Pooley*, 40 Ch. D. 1; 58 L. J. Ch. 1; 60 L. T. 73; approving *In re Barber*, 31 Ch. D. 665, see

**Notes to Prec. 23.**

p. 36, *supra*. It seems that as the effect of this clause is to give the solicitor a bounty under the will, if the estate prove insolvent the clause cannot take effect as against creditors, *In re Barber*, *ubi supra*.

Mode of measuring distances.

(*h*) Distances are measured, not by the nearest practicable way of access, but "as the crow flies." Such at least is the method adopted in construing Acts of Parliament, *Reg.* v. *Saffron Walden*, 9 Q. B. 76; 15 L. J. M. C. 115; *Lake* v. *Butler*, 5 E. & B. 92; 24 L. J. Q. B. 273; and contracts, *Duignan* v. *Walker*, Joh. 446; 28 L. J. Ch. 867; *Mouflet* v. *Cole*, L. R. 8 Exch. 32; 42 L. J. Ex. 8; 27 L. T. 678; where mention is made of a given distance without specifying the mode of measurement. It is presumed that the same method would be applicable to the measurement of distances mentioned in a will; and that if testator means the measurement to be taken along the roads, streets, railways, or other ways of communication, he must express his intention.

(*i*) See note (*f*), Prec. VI.

(*j*) See note (*g*), Prec. XII.

## No. XXIV.

WILL *of a* TRADER *disposing of Real and Personal Estate in favour of his Wife and Children.—Specific Bequest to Wife of Wearing Apparel, Wines, &c.—Bequest of Railway Shares.—Pecuniary Legacies to Trustees to invest and pay Income to Wife for Life, Capital for Children as she shall by Will appoint; in Default of Appointment, to fall into Residue.—Real Estate and Residuary Personal Estate to Trustees; to permit Wife to carry on Trade, and to occupy and use the Testator's Dwelling-house, Furniture, &c., while any Son shall be under Age, or Daughter under Age and unmarried, with discretionary Power for the Trustees after her Death or Marriage to carry on, or permit her to carry on, the Trade; eventually to sell or convert, and to divide the Produce among all the Children.—Real and Personal Estate to be valued.—Powers to maintain the Children after the Death or Marriage of the Wife out of the general Income; to advance Children Part of their Shares of Valuation; to raise Money by Mortgage, &c.—Option to Sons in succession to Purchase Real Estates.—Powers to settle Partnership concerns, and appoint Trustees.—Special Exemption of Trustees from Responsibility for the Receipts and Acts of each other.—Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I BEQUEATH to my wife [*name*] all the wines liquors household stores fuel and other articles of household consumption which shall at my death be in or about my then dwelling-house and all my wearing apparel I BEQUEATH to my wife the sum of £—— to be paid to her immediately after my death to enable her to purchase mourning for herself and my family I BEQUEATH to my wife twenty shares

Bequest of wines, &c., to wife.

Pecuniary legacy to wife.

**Prec. 24.**

Bequest of railway shares.

in the —— Railway Company together with any dividends or apportioned part of dividends thereon that may be due to me at my death subject nevertheless to the payment by her of such sums of money or calls thereon as shall become payable after my death But I declare that any call or calls which may be in arrear and unpaid at my death with all interest thereon shall be paid out of my personal estate and that my wife shall be entitled to the benefit of any call or calls sum or sums of money which I may at my death have paid upon the said shares in advance (*a*) I BEQUEATH to the Treasurer for the time being of the —— Infirmary the sum of £—— to be applied to the purposes of that institution (*b*) I BEQUEATH to my friends [*names &c.*] the sum of £—— to be paid at the end of —— calendar months after my death upon the trusts following (that is to say) UPON TRUST to invest the same in their names And upon further trust to pay the annual produce of the same sum of £—— or the investment thereof to my wife during her life and after her death then As to as well the capital as the annual produce thenceforth to become due IN TRUST for all or any one or more of my children for such interest or interests in such shares and in such manner as my wife by her will or any codicil thereto shall appoint but so that the vesting be not postponed beyond twenty-one years after the death of my wife and in default of appointment upon the trusts hereinafter declared concerning the residue of my personal estate BUT I DECLARE that if during the life of my wife the said annual produce or any part thereof shall by any means whatever vest in any other person or persons than my wife so that my wife shall be deprived of the personal enjoyment thereof then the trust hereinbefore contained in her favour shall as to the annual produce which shall so vest in or become payable to any other person or persons thenceforth absolutely cease and the same annual produce shall during the remainder of her life be applied in the same manner as the same would be applicable if she were dead without having exercised the power of appointment hereinbefore given to her I DEVISE all the real estate and bequeath the residue of the personal estate of or to which I shall be seised possessed or

Pecuniary legacy to a charitable institution.

Bequest to trustees,

—to invest;

—income to wife for life;

—capital for testator's children as she shall appoint;

—in default, to fall into residue.

Cesser of wife's life interest on alienation.

Devise of real and bequest of residue of personal

**Prec. 24.**

entitled at my death or over which I shall at that time have any disposing powers (*c*) unto and to the use of the said [*trustees*] their heirs executors administrators and assigns respectively UPON TRUST so long as my wife shall continue my widow and any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married to permit my wife to carry on my business of —— at —— aforesaid and to employ for that purpose such part of my real and personal estate as shall constitute the capital employed therein at my death with any additional capital which my trustees shall think requisite (*d*) And also to permit her during the same period (whether she shall carry on such business or not) to have the occupation use and enjoyment of the leasehold messuage or tenement wherein I now reside at —— aforesaid with the garden and appurtenances and the household furniture implements and utensils plate linen china and glass which shall be in or about the same messuage and premises at my death And I declare that the rent and taxes payable in respect of the said leasehold premises during my wife's occupation thereof shall be paid out of my estate but she shall bear the expense of repairing the same premises and insuring the same and my effects therein against fire And in case my wife shall die or marry while any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married then UPON TRUST in the discretion of my trustees either to discontinue or to carry on the said business or cause the same to be carried on under their inspection and control so long as any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married and for that purpose to employ as capital any part of my real or personal estate with liberty if my trustees shall think fit to permit my wife notwithstanding her marriage to continue to enjoy the benefit of the trust hereinbefore contained in her favour during widowhood subject to any restrictions or modifications which my trustees shall deem advisable And subject to the trusts aforesaid As to my said real and residuary personal estate UPON TRUST with the consent in writing of my wife while she shall continue my

estate to trustees,

—to permit wife, during widowhood, &c., to carry on trade,

—and to occupy testator's dwelling-house, &c.

—trustees to pay rent and taxes during wife's occupation;

—in the event of wife's death or marriage, trustees may carry on trade.

Subject to previous trusts, to sell and convert

**Prec. 24.**

residuary real and personal estate, and invest proceeds;

—to permit wife, during widowhood, to receive the income, bringing up children;

—capital for children equally, with benefit of accruer.

Provision for case of child of testator predeceasing him.

widow and any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married and afterwards in the discretion of my trustees to sell convert and get in such real and residuary personal estate AND UPON FURTHER TRUST with such consent or in such discretion as aforesaid to invest the moneys to arise therefrom in the names of my trustees AND UPON FURTHER TRUST to pay the yearly produce of the trust fund constituted of such moneys or of the stocks funds or securities whereon the same shall be invested to my wife so long as she shall continue my widow she thereout maintaining clothing educating and bringing up my sons for the time being under the age of twenty-one years and my daughters for the time being under that age not having been married And after the determination of the trust lastly hereinbefore contained then As to the same trust fund and the yearly produce thenceforth to accrue due for the same IN TRUST for my children in equal shares and if any of them being a son or sons shall die under the age of twenty-one years (*e*) or being a daughter or daughters shall die under that age without having been married then as to the share or shares original and accruing of the child or children so dying In trust for the others or other of my children and if more than one in equal shares And if no child of mine being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married THEN UPON TRUST to permit my wife to receive the yearly produce of the said trust fund during her life and after her death as to the same trust fund and the yearly produce thereof IN TRUST for such person or persons as at the time of her death would be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I were to die immediately after her death intestate (*f*) such persons if more than one to take distributively according to the said statutes I DECLARE that if any of my children shall die in my lifetime and any issue of such child or children respectively so dying shall be living at my death then the share or shares original and accruing to which such child or children so dying would if living at my death have been

Prec. 24.

entitled under the trusts aforesaid shall be held by my trustees Upon trust for such persons and in such manner as the same would have been held if such child or children respectively had died immediately after my death (*g*) I direct my trustees within —— calendar months after my death to cause my real and personal estate to be valued by two competent valuers or if they shall disagree by a third valuer to be named by them before entering upon the valuation as their umpire I declare that it shall be lawful for my trustees in their discretion either during the continuance or after the determination of the trusts hereinbefore contained antecedent to the trust in favour of my children to raise and apply in or towards the advancement in life of each or any child of mine by apprenticing such child to any trade or business or otherwise any part or parts of his or her share of my estate not exceeding in the whole £—— I direct that notwithstanding the trusts hereinbefore contained antecedent to the trust in favour of my children my trustees shall as and when during the subsistence of all or any of such antecedent trusts any child of mine being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married raise and pay to such child in part satisfaction of his or her share of my estate such sum as shall amount or as the case may be shall together with the money if any previously advanced for the benefit of such child under the provision for advancement hereinbefore contained be equal to two-third parts in value of the original share of such child in my estate estimated at the surplus of the valuation hereinbefore directed to be made after deducting the amount of my debts funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed But my trustees shall be at liberty with the consent of the child for whom such sum shall be raiseable to retain the same or any part thereof to be employed as capital in carrying on my said business and allow interest thereon at the rate of £—— per cent. per annum by half-yearly payments I declare that it shall be lawful for my trustees after the trust hereinbefore contained for payment to my wife of the yearly produce of my said trust fund shall determine by her death or marriage and thenceforth so long

Valuation to be made of residuary estate.

Power to advance children, notwithstanding the prior trusts.

Sons at twenty-one and daughters at twenty-one or marriage, to receive part of their shares;

—with power to trustees to retain the same as capital for carrying on the business.

Provision for maintenance of children during minority.

**Prec. 24.**

as any child of mine being a son shall be under the age of twenty-one years or being a daughter shall be under that age not having been married to apply the whole or any part of the yearly produce of the same trust fund for the common maintenance education and bringing up of my son or sons for the time being under that age not having been advanced in life as aforesaid and my daughter or daughters for the time being under that age not having been married or advanced as aforesaid and for that purpose in the discretion of my trustees to suspend the payment of any sum or sums of money which any child or children shall under the provision lastly hereinbefore contained have become entitled to receive and the payment of interest thereon I DECLARE that it shall be lawful for my trustees notwithstanding any of the trusts hereinbefore contained to raise any money which shall in their opinion be requisite to answer the deficiency if any of my personal estate not hereinbefore specifically bequeathed to satisfy my debts and funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed or to answer the aforesaid provision for the advancement of my children or the aforesaid provision for part payment of their respective shares by selling mortgaging or charging my real and personal estate or any part or parts thereof or by all or any of those means in such manner as my trustees shall think expedient And that the costs of and incident to the said sales and mortgages and of and to any transfers not only of the same mortgages but of any other mortgages upon my estate which in the opinion of my trustees may from time to time be necessary shall be charged upon or paid out of the corpus of my estates I DECLARE that my trustees shall not in the lifetime of any son or sons of mine who shall have attained the age of twenty-one years sell my real estate or any part thereof until the same shall have been offered by my trustees in writing under their hands to such son if only one or to such sons if more than one successively according to the priority of their birth at a valuation to be made by two valuers named by my trustees or if such valuers shall disagree then to be made by a third valuer to be named by the other two before they shall enter upon the valuation as their umpire nor until such

Power to trustees to raise money by sale or mortgage.

Testator's sons to have liberty of pre-emption at a valuation.

son or each and every of such sons shall have refused or omitted to notify in writing under his hand to my trustees his acceptance of the offer within ten days after the making thereof but no purchaser under my will shall be concerned to take notice of this direction I DECLARE that no purchaser or mortgagee shall be obliged to ascertain the occurrence or existence of any event or purpose in or for which a sale mortgage or charge is hereinbefore authorised to be made or to inquire into or take notice of any matter connected with the propriety or regularity of any sale mortgage or charge I EMPOWER my trustees to adjust and settle my partnership accounts and concerns with my partner [*name*] which it is my wish should be settled in the most liberal manner I EMPOWER my wife during her life to appoint a new trustee or new trustees of my will as occasion shall arise AND I DIRECT that the trustees for the time being of this my will shall be responsible for so much money only as shall come to their own respective hands and that they shall not be answerable for involuntary losses or for the acts or defaults of each other and particularly that any trustee who shall pay over to his co-trustee or shall do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of my will or for any definite purpose authorised by my will shall not be obliged to see to the due application thereof nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys (*h*) but this clause shall not restrict the power of any trustee to require from his co-trustee an account of the application of moneys in his hands or to insist on his replacing moneys misapplied by him I APPOINT my said trustees [*names*] to be executors of my will and I appoint my wife (she continuing my widow) and my said trustees to be guardians of my children during their respective minorities (*i*) AND I REVOKE all former wills and testamentary instruments IN WITNESS &c.

Purchasers and mortgagees not required to ascertain the propriety of sale or mortgage.

Power to trustees to settle partnership concerns.

Power to appoint trustees.

Special indemnity to trustees.

Appointment of executors and guardians.

**NOTES to Precedent XXIV.**

(*a*) In a gift of railway shares upon which calls have been paid in advance, or are still to be paid, it is advisable to express whether or not the legatee is to take the shares as paid up in advance; and on the

Calls on shares.

**Notes to Prec. 24.**

other hand, upon whom the burthen of the calls due, but unpaid, and of any future calls, is to be imposed.

Payments requisite to make testator's interest complete.

Where a testator specifically bequeaths shares, but further payments are required to make perfect the interest which the testator professes specifically to bequeath, the general personal estate is applicable for that purpose. But where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated by him and by all persons unconnected with it, the future calls fall on the legatee, and not on the general personal estate, *Armstrong* v. *Burnet*, 20 Be. 424; 24 L. J. Ch. 473. Thus, if the call was made before the testator's death, the general personal estate would be at the expense of it, but if the calls were made after the testator's death, they would have to be borne by the specific legatee, *Addams* v. *Ferick*, 26 Be. 384; 28 L. J. Ch. 594. See also *Day* v. *Day*, 1 Dr. & S. 261; 29 L. J. Ch. 466; 2 L. T. 167; *Re Box*, 1 H. & M. 552; 33 L. J. Ch. 42; 9 L. T. 372. The testator's estate remains liable to the calls so long as the shares remain standing in his name in the company's books. And as to payment of calls out of income or out of capital, see *Bevan* v. *Waterhouse*, 3 Ch. D. 752; 46 L. J. Ch. 331; also Buckley on Companies Acts (9th edition), 584.

A bequest of "shares" will pass capital stock, *Morrice* v. *Aylmer*, L. R. 7 H. L. 717; 45 L. J. Ch. 614; 34 L. T. 218; but not debenture stock, *In re Bodman*, '91, 3 Ch. 135; 61 L. J. Ch. 31; 65 L. T. 522.

A bequest of "all my debentures" will pass both debentures and debenture stock, *In re Herring*, '08, 2 Ch. 493; 77 L. J. Ch. 665; 99 L. T. 144.

Where a testator bequeathed "fifty shares in the York Union Banking Company," and at the date of the will the company was an unlimited one, and its shares were 100*l.* each nominal value, this was held to be not a specific but a general legacy of such a sum as at the death of the testator should be the value of fifty shares of 100*l.* each in the unlimited company; and as, by reason of the conversion of the company from unlimited to limited liability, and the alteration in the nominal value of the shares from 100*l.* to 60*l.*, which the testator was aware of, it had become impossible to determine the value of the legacy, the bequest failed, *In re Gray*, 36 Ch. D. 205; 56 L. J. Ch. 975; 57 L. T. 132.

Dividends.

As between tenant for life and remainderman on whom canal shares were settled, a dividend declared before, but payable after, the death of the tenant for life, was held to belong to his estate, *Wright* v. *Tuckett*, 1 J. & H. 266; *De Gendre* v. *Kent*, L. R. 4 Eq. 283; 16 L. T. 694. And where a testator bequeathed shares in a public company to a legatee for life with remainder over, and a dividend was declared after his death, in respect of profits made in his lifetime, it was held that the dividends formed part of the income, and not of the *corpus* of the testator's estate, and belonged to the legatee for life, *Bates* v. *Mackinley*, 31 Be. 280; 31 L. J. Ch. 389; 5 L. T. 783. See also *Re Hopkins' Trusts*,

**Notes to Prec. 24.**

L. R. 18 Eq. 696; 43 L. J. Ch. 722; 30 L. T. 627, and the note on apportionment, *ante*, p. 187.

Bonus.

As to a bonus on shares, see *Loch* v. *Venables*, 27 Be. 598; 29 L. J. Ch. 179; 1 L. T. 506; *Maclaren* v. *Stainton*, 3 D. F. & J. 202; 30 L. J. Ch. 723; *Plumbe* v. *Neild*, 29 L. J. Ch. 618; *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617. As to bonuses on South Sea Stock passing by an assignment of the assignor's reversionary interest in the stock, see *Re Armstrong's Trusts*, 3 K. & J. 486. And generally on questions as to the right to bonuses and accretions, see the cases cited in the note to *Gilley* v. *Burley*, 22 Be. 624; *Roberts* v. *Edwards*, 33 Be. 259; 33 L. J. Ch. 369; 9 L. T. 360; *Edmondson* v. *Crosthwaite*, 34 Be. 30; *Re Barton's Trust*, L. R. 5 Eq. 238; 37 L. J. Ch. 194; 17 L. T. 594.

As to gifts in favour of charity.

(*b*) By the Mortmain and Charitable Uses Act, 1891, land—which expression includes tenements and hereditaments, corporeal or incorporeal, of any tenure—may now be devised and assured by will to or for the benefit of any charitable use, but such land must, *notwithstanding anything in the will contained to the contrary*, be sold within one year from the death of the testator. This time may be extended by the High Court or the Charity Commissioners. Accordingly, a devise of a reversionary real estate to a charity is now valid, *Re Hume*, '95, 1 Ch. 422; 64 L. J. Ch. 267; 72 L. T. 68. Any personal estate by will directed to be laid out in the purchase of land for the benefit of any charitable uses will be held for the benefit of the charitable uses as though there had been no such direction. However, the Court, and also the Charity Commissioners, are authorised to sanction the retention or acquisition, as the case may be, of any land devised and assured by will for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out, in the purchase of land, if satisfied that such land is required for actual occupation for the purposes of the charity, and not as an investment. The Act, however, does not affect Part III. of the Mortmain and Charitable Uses Act, 1888. Part III. of this Act gives power to a testator—whose will must for this purpose be executed not less than twelve months before his death, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the testator, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator—to devise any quantity of land not exceeding twenty acres for any one public park, and not exceeding two acres for any one public museum, and not exceeding one acre for any one school-house for an elementary school.

Devises of land or bequests of personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the Colleges, or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only

**Notes to Prec. 24.**

upon the foundations of those last-mentioned Colleges, or to or in trust for the warden, council, and scholars of Keble College, are preserved from the operation of the Mortmain and Charitable Uses Act, 1888. This Act repealed, among others, the Act 9 Geo. 2, c. 36, usually known as the Statute of Mortmain, which, however, it re-enacted in many provisions.

Money secured on land or other personal estate arising from or connected with land is expressly excluded from the definition of the term "land" in the Mortmain and Charitable Uses Acts of 1888 and 1891, and may therefore now be bequeathed to charities without any fear as to the operation of those Acts.

The Act of 1891 only applies to the wills of testators dying after the passing of the Act (Sect. 9).

In *In re Bridger*, '94, 1 Ch. 297; 63 L. J. Ch. 186; 70 L. T. 204, a testator, who died after the passing of the Act, by his will made before the Act bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, and from and after her decease in trust to pay "such part of my said residuary trust estate which may by law be given for charitable purposes," to the Brompton Hospital, and as to the remainder of the said residuary trust estate upon trust for E. W. absolutely. *Held*, that the Act applied, and that the will did not show any intention on the part of the testator to confine the gift to the hospital to such property only as could by the law, as it stood at the date of the will, be given for charitable purposes, and that the hospital was entitled to all the residue of the testator's estate, realty as well as personalty.

As to bequests of money to be laid out in land.

Previous to the Act of 1891, bequests to a charity upon trusts which involved throwing land into mortmain were invalid, as a trust for the erection of buildings, the construction being that a direction to build includes a direction to buy land upon which to build, unless the testator distinctly refers to land already in mortmain, *Attorney-General* v. *Davies*, 9 Ves. 535; 7 R. R. 295; *Pritchard* v. *Arbouin*, 3 Rus. 456; 27 R. R. 106; *Trye* v. *Corporation of Gloucester*, 14 Be. 173. But where the effect of the bequest was not to throw land into mortmain, the bequest was upheld. Thus it was held that legacies for the "establishment" or "maintenance" or "carrying on" of schools, or for the "endowment" of churches, chapels, or schools, might be supported, as not necessarily involving a purchase of land, because a house might be hired for the purpose, *Attorney-General* v. *Williams*, 4 Br. C. 526; *Kirkbank* v. *Hudson*, 7 Pri. 212; 25 R. R. 751; *Johnston* v. *Swann*, 3 Mad. 457; 18 R. R. 270; *Cawood* v. *Thompson*, 1 S. & G. 409; *Edwards* v. *Hall*, 6 D. M. & G. 72; *Hartshorne* v. *Nicholson*, 26 Be. 58; and the fact of the testator expressing his expectation that land would be provided by another, would not invalidate the gift, *Henshaw* v. *Atkinson*, 3 Mad. 306; and see *Philpott* v. *St. George's Hospital*, 6 H. L. C. 338. Money might be bequeathed for the repair and improvement of real estate already devoted to charity, not excepting

**Notes to Prec. 24.**

even the erection of buildings, as by this means no additional land was thrown into mortmain. *Attorney-General* v. *Parsons*, 8 Ves. 186; 7 R. R. 22; *Attorney-General* v. *Munby*, 1 Mer. 327; 15 R. R. 124; as *e.g.* for the erection of a parsonage-house, where there is glebe, *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60; 36 L. J. Ch. 136; but the will must either refer to an existing site already in mortmain, or must expressly exclude the application of the money in the purchase of land, *Re Watmough's Trusts*, L. R. 8 Eq. 272; 38 L. J. Ch. 723; *Hawkins* v. *Allen*, L. R. 10 Eq. 246; 40 L. J. Ch. 23; 23 L. T. 465; *Pratt* v. *Harvey*, L. R. 12 Eq. 544; 25 L. T. 200; *Cox* v. *Davie*, 7 Ch. D. 204; 47 L. J. Ch. 72; 47 L. T. 457. The Acts of 1888 and 1891 do not extend to Scotland or Ireland.

Technical and Industrial Institutions Act, 1892.

By the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 10, assurances of land by will to institutions mentioned in the Act are exempt from Parts I. and II. of the Act of 1888, and from the requirement as to sale within one year from the death of the testator contained in the Act of 1891.

Land Tax.

The Land Tax Redemption Act of 42 Geo. 3, c. 116, s. 50, enables persons to give money by will or otherwise, to be applied in the redemption of the land tax affecting lands settled to charitable uses. And by s. 162, land tax redeemed or purchased under the provisions of the same Act may be given by deed, will or otherwise for the augmentation of any living. As to impropriation tithes, see 13 & 14 Vict. c. 94, s. 23.

Gifts of land valid: Queen Anne's Bounty, church lands.

Gifts of land by will to the Governors of Queen Anne's Bounty are authorised by statutes 2 & 3 Ann. c. 11, and 43 Geo. 3, c. 107; see also 45 Geo. 3, c. 84; 7 Geo. 4, c. 66; as also gifts for the augmentation, under certain limitations, of church lands, by statute 43 Geo. 3, c. 108 (the devise not to exceed five acres), 51 Geo. 3, c. 115, and subsequent Acts (see also 7 Geo. 4, c. 66).

Endowment or augmentation of income of clergy.

For the encouragement of such persons as shall be disposed to contribute towards the purposes of the *Act to make better provision for the spiritual care of populous parishes* (6 & 7 Vict. c. 37), it is enacted (by sect. 22, explained by 7 & 8 Vict. c. 94, s. 7, and extended by 14 & 15 Vict. c. 97, s. 24, and 19 & 20 Vict. c. 104, s. 4), that any person having in his own right any estate or interest in any lands, tithes, tenements or other hereditaments, shall have power by deed enrolled or by will, to give to and vest in the Ecclesiastical Commissioners all or any part of his estate or interest in such lands, &c., for the endowment or augmentation of the income of ministers or perpetual curates, or for providing any church or chapel for the purposes and subject to the provisions of the said Act.

British Museum.

Devises of land to the British Museum are authorised by 5 Geo. 4, c. 39; by 22 Vict. c. 27, s. 7, personalty not exceeding 1,000*l.* may be given by will to purchase or maintain recreation grounds; and as to the incorporation of trustees of charities, see 35 & 36 Vict. c. 24.

Recreation grounds.

As to bequests of

The law imposes no restriction whatever on gifts of pure personalty, to any legal charitable purpose; and it would be no objection that such

**Notes to Prec. 24.**

personalty to charity.

purpose is of indefinite duration. Thus, if a testator bequeaths 1,000*l.* Two and Three-quarters per Cent. Consols to the vicar of A. for the time being, upon trust to apply the dividends thereof to the most deserving of his poor parishioners not receiving parochial relief, from year to year for ever, there can be no doubt of the validity of the gift, though created for a purpose capable of enduring, and likely to endure, for ages; and even in the event of the failure of the particular objects, if the testator has manifested a general charitable design, such design would not be wholly frustrated, but would be executed *cy-près* under the established doctrine that property once devoted to charity remains so devoted, notwithstanding the failure of its particular objects. But if the testator has not manifested a general charitable design, but has merely bequeathed a legacy in favour of a particular charitable object which fails in his lifetime, then there is a lapse, and the doctrine of *cy-près* has no place. See *Clark* v. *Taylor*, 1 Drew. 642; *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; 17 L. T. 27; *Re Rymer*, '95, 1 Ch. 19; 64 L. J. Ch. 86; 71 L. T. 590. Here then we have an instance of a perpetuity, not only tolerated by the law, but the object of its special sanction and encouragement, which, it is clear, would be equally extended to lands conveyed to charitable uses by a deed enrolled. It is clear, however, that a trust for accumulation in favour of a charity is not allowed to exceed the limits imposed by the Thellusson Act, *Martin* v. *Margham*, 14 Sim. 230; 13 L. J. Ch. 392; 65 R. R. 571; and see *post*, p. 388. As to a conditional gift to a charity, see *In re Swain*, '05, 1 Ch. 669; 74 L. J. Ch. 354; 92 L. T. 715.

Accumulations.

What are charities.

A purchase by parish officers of land and houses to be used as a workhouse, is not a purchase for a "charitable use" within the 9 Geo. 2, c. 36, *Burnaby* v. *Barsby*, 4 H. & N. 690; 7 W. R. 693. A gift of a house to a "public library"—such library being an institution supported by private subscriptions (and consequently liable to dissolution), governed by persons chosen from amongst the subscribers, and existing only for the benefit of the subscribers—is not a gift to charity within the meaning of the Act, but is void as tending to a perpetuity, *Carne* v. *Long*, 2 D. F. & J. 75; 29 L. J. Ch. 503. See *Cocks* v. *Manners*, L. R. 12 Eq. 574; 40 L. J. Ch. 640; 24 L. T. 869, as to gifts to voluntary religious institutions; *Re Clark's Trust*, 1 Ch. D. 497; 45 L. J. Ch. 194; *Re White*, '93, 2 Ch. 41; 62 L. J. Ch. 342; 68 L. T. 187, as to a friendly society; *Re Dutton*, 4 Ex. D. 54; 48 L. J. Ex. 350, as to a building fund in connection with a mechanics' institution. A gift to the churchwardens of a parish of a sum to be invested in Government or real securities, and the interest applied in keeping in repair the tombs of the testator and certain of his relatives, is not a charitable use, but is void as tending to a perpetuity, *Rickard* v. *Robson*, 31 Be. 244; 31 L. J. Ch. 897; 7 L. T. 87. But where a testator gave a fund to the trustees of charity A., and committed the care of his family vault in H. cemetery to their care and charge, the "same to be kept in good repair, and name legible, and to re-build when it shall require; failing to comply with this request, the money to go to" charity

**Notes to Prec. 24.**

B., it was held by the Court of Appeal that the condition for the repair, &c., was valid, and binding on charity A., and that the gift over, on failure to comply with the condition, to charity B., was good, on the principle of *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; 19 L. J. Ch. 33, that the rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another, *In re Tyler*, '91, 3 Ch. 252; 60 L. J. Ch. 686; 65 L. T. 367. But this principle does not extend to cases where (a) an immediate gift in favour of private individuals is followed by an executory gift over in favour of a charity, nor (b) an immediate gift to a charity is followed by an executory gift over in favour of private individuals, *Re Bowen*, '93, 2 Ch. 491; 62 L. J. Ch. 681; 68 L. T. 789. See *Hoare* v. *Osborne*, L. R. 1 Eq. 585; 35 L. J. Ch. 345; 14 L. T. 9, as to a gift to keep in repair a monument *in* a church, being an ornament, not part of the fabric; *Hunter* v. *Bullock*, L. R. 14 Eq. 45; 41 L. J. Ch. 637; 26 L. T. 349; *Dawson* v. *Small*, L. R. 9 Ch. 651; 43 L. J. Ch. 406; 30 L. T. 252; *Re Williams*, 5 Ch. D. 735; 47 L. J. Ch. 92; *Re Birkett*, 9 Ch. D. 576; 47 L. J. Ch. 846, where there were gifts of the surplus fund after void gifts for keeping tombs in repair; *In re Vaughan*, 33 Ch. D. 187; 55 L. T. 547; *In re Rogerson*, '01, 1 Ch. 715; 70 L. J. Ch. 444; 84 L. T. 200; *In re Manser*, '05, 1 Ch. 68; 74 L. J. Ch. 95; 92 L. T. 79; *In re Douglas*, '05, 1 Ch. 279; 74 L. J. Ch. 196; 92 L. T. 78. As to "aged persons" as objects of charitable gifts within 43 Eliz. c. 4, see *In re Wall*, 42 Ch. D. 510; 59 L. J. Ch. 172; 61 L. T. 357. As to a gift "to the poor and the service of God," see *Re Darling*, '96, 1 Ch. 50; 65 L. J. Ch. 62; 73 L. T. 382. A legacy for the maintenance of the horses and dogs of the testator is not a charitable gift, nor void as a perpetuity, *In re Dean*, 41 Ch. D. 552; 58 L. J. Ch. 693; 60 L. T. 813. It would seem that the Society for the Protection of Animals liable to Vivisection, and also the Home for Lost Dogs, are charities within 43 Eliz. c. 4. The Society for the Total Suppression of Vivisection is a charity within the statutes, *Re Foveaux*, '95, 2 Ch. 501; 64 L. J. Ch. 856; 73 L. T. 202. Friendly Societies may be charities, *Spiller* v. *Maude*, 32 Ch. D. 158, n.; *Pease* v. *Pattinson*, 32 Ch. D. 154; 55 L. J. Ch. 617; 54 L. T. 209; *Cunnack* v. *Edwards*, '96, 2 Ch. 679; 65 L. J. Ch. 801; 75 L. T. 122; *Re Buck*, '96, 2 Ch. 727; 65 L. J. Ch. 881; 75 L. T. 312.

A volunteer corps is a charitable object, *Re Lord Stratheden and Campbell*, '94, 3 Ch. 265; 63 L. J. Ch. 872; 71 L. T. 225. See also *In re Donald*, '09, 2 Ch. 410. So is an officers' mess, *In re Good*, '05, 2 Ch. 60; 74 L. J. Ch. 512; 92 L. T. 796. But a gift for the encouragement of mere sport is not charitable, though it may be beneficial to the public. Therefore, a bequest to provide an annual cup for the encouragement of yacht racing is not charitable, *Re Nottage*, '95, 2 Ch. 649; 64 L. J. Ch. 695; 73 L. T. 265. A bequest for "charitable or philanthropic purposes" is not charitable, *Re Macduff*, '96, 2 Ch. 451; 65 L. J. Ch. 700; 74 L. T. 706; nor is one for "emigration uses," *In re Sidney*, '08, 1 Ch. 488; 77 L. J. Ch. 296; 98 L. T. 625. A bequest to

**Notes to Prec. 24.**

provide funds for the purchase of advowsons to promote the spread of evangelical principles in the church is charitable, *Re Hunter*, '97, 2 Ch. 105; 66 L. J. Ch. 545; 76 L. T. 725. But see *In re Church Patronage Trust*, '04, 2 Ch. 643; 73 L. J. Ch. 712; 91 L. T. 705.

Bequests to Dissenters, Romanists, Jews.

As to bequests to Protestant Dissenters, see *Attorney-General* v. *Baxter*, 1 Ver. 248; 2 Ver. 104; *Attorney-General* v. *Cock*, 2 Ves. S. 273; *Shrewsbury* v. *Hornby*, 5 Ha. 406; *Attorney-General* v. *Lawes*, 8 Ha. 32; to Roman Catholics, *West* v. *Shuttleworth*, 2 M. & K. 684; 39 R. R. 327; *Walsh* v. *Gladstone*, 1 Ph. 290; 65 R. R. 387; *Attorney-General* v. *Gladstone*, 13 Sim. 7; 60 R. R. 300; *Heath* v. *Chapman*, 2 Drew. 417; *Re Blundell's Trusts*, 30 Be. 360; to Jews, *Straus* v. *Goldsmid*, 8 Sim. 614; 42 R. R. 244; *Re Michel's Trust*, 28 Be. 39; 29 L. J. Ch. 547; 2 L. T. 46.

The law regulating charitable gifts certainly exhibits a singular mixture of opposite principles. Impediments are thrown in the way of devoting land to charitable uses; but, if those impediments are overcome, the land thus appropriated is never suffered to revert to the donor or his representatives on account of the failure of the charitable objects, or (which is still stronger) even on account of the donor's omission originally to describe the objects with sufficient definitiveness —circumstances which, by the ordinary rule of construction, would have been fatal to the gift. It should be observed, that though a gift to charity will be sustained, notwithstanding a want of specification of objects, yet it must be distinctly shown that charity is the intended destination, see *In re Sutton*, 28 Ch. D. 464; and, if this is uncertain, the doctrine in question lends no support to the intended disposition, as in the case of a trust for such charitable or other purposes, *Ellis* v. *Selby*, 1 M. & C. 286; 43 R. R. 188; or even for such charitable or public purposes as A. shall appoint, *Morice* v. *Bishop of Durham*, 9 Ves. 399; 7 R. R. 232; 10 Ves. 522; *Vezey* v. *Jamson*, 1 S. & S. 69; in which cases, the testator having evinced an intention to create a trust but without any definite indication of his purpose, the beneficial interest in the property is undisposed of. See also *Williams* v. *Kershaw*, 5 C. & F. 111; *In re Jarman's Estate*, 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89.

Wide range of objects, no objection to charitable bequest.

It is no objection, however, that the charity embraces an almost indefinite range of objects, of which a striking example is afforded by *Nightingale* v. *Goulbourn*, 2 Ph. 594, where a bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, was held to be valid as to the pure personalty, though void, under the Act of 9 Geo. 2, with respect to the personal estate savouring of the realty. In *Whicker* v. *Hume*, 7 H. L. C. 124; 28 L. J. Ch. 396, where the bequest was to trustees in their discretion, "for the benefit and advancement and propagation of education and learning in every part of the world as far as circumstances will permit," this was held to be a valid gift to charity. In *In re Best*, '04, 2 Ch. 354; 73 L. J. Ch. 808, Farwell, J.,

**Notes to Prec. 24.**

held that a bequest of residue upon trust for "such charitable and benevolent institutions" as the trustees should in their discretion determine was not void for uncertainty but was a good charitable gift. See also *Dolan* v. *Macdermot*, L. R. 3 Ch. 676; *Wilkinson* v. *Lindgren*, L. R. 5 Ch. 570; 39 L. J. Ch. 722; 23 L. T. 375; *Re White*, '93, 2 Ch. 41; 62 L. J. Ch. 342; 68 L. T. 187; *In re Allen*, '05, 2 Ch. 400; 74 L. J. Ch. 593; 93 L. T. 597; *In Re Pardoe*, '06, 2 Ch. 184; 75 L. J. Ch. 455; 94 L. T. 567; *Weir* v. *Crum Brown*, '08, App. Cas. 162; 77 L. J. P. C. 41; 98 L. T. 325; *In re Freeman's Will*, '08, 1 Ch. 720; 77 L. J. Ch. 401; 98 L. T. 499. For the construction of a bequest to a named charitable institution, "or some one or more kindred institutions," see *In re Delmar*, '97, 2 Ch. 163; 66 L. J. Ch. 555; 76 L. T. 594.

(*c*) General testamentary powers are well executed by a general testamentary disposition unless a contrary intention appears by the will, see sect. 27, *ante*, p. 65. General testamentary powers.

But no mere general gift, however unlimited in its terms, unless it refers either to the power or to the property, will execute a special or particular power (except, perhaps, where the will would fail altogether unless it operated as an execution of the power, see *Davies* v. *Davies*, 7 W. R. 85); but a wrong reference to or a misdescription of the instrument under which the power is derived will not invalidate the execution, *Re Wilmot*, 29 Be. 644. The Wills Act makes no alteration in the law respecting special powers, see sect 27, *ante*, p. 65, and the note thereto. Special testamentary powers.

A testamentary power, whether general or special, purporting to be exercised by will dated before 1838, required to be executed with all the formalities prescribed by the instrument creating the power. But a testamentary power exercised by will dated after 1837, requires to be executed with the formalities prescribed by 1 Vict. c. 26, s. 9 (*ante*, p. 10), for the valid execution and attestation of wills; and with all other (if any) formalities (not relating to the ceremony of execution and attestation) prescribed by the instrument creating the power (*vide* sect. 10, *ante*, p. 29). As to the formalities of execution.

Where there is a power to appoint among certain objects, but no appointment is made, and there is no gift in default of appointment, the Court will sometimes imply a gift to the objects of the power equally, *Brown* v. *Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 4 R. R. 323; *Burrough* v. *Philcox*, 5 M. & C. 73; 48 R. R. 236; *Butler* v. *Gray*, L. R. 5 Ch. 26; 39 L. J. Ch. 291; *Wilson* v. *Duguid*, 24 Ch. D. 244; 53 L. J. Ch. 52; 49 L. T. 124. See also *Re Eddowes*, 1 Dr. & S. 395; *Goldring* v. *Inwood*, 3 Gif. 139. As to the period for ascertaining the class, when the objects of the power are a class, see *Re White's Trusts*, Joh. 656. No appointment and no gift in default.

(*d*) See note (*a*), Prec. XXIII.

(*e*) The gift being to the children as a class, those only can participate who survive the testator (see *ante*, sect. 33, p. 77; see also note (*l*), Prec. XI.). To provide to some extent for the death of a child in the

**Notes to Prec. 24.**

testator's lifetime leaving issue at his death, a clause of substitution is added, see note (*g*), *post*, p. 377.

Gift to next of kin.

(*f*) In framing gifts to next of kin it is of importance to express whether it is to embrace the persons answering the description at the time of the testator's death, or when the gift takes effect in possession. See *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; 48 L. J. Ch. 470; *In re Wilson*, '07, 2 Ch. 572; 77 L. J. Ch. 13; 97 L. T. 656. It is also necessary to show that the persons who would be entitled under the Statutes of Distribution are the beneficiaries referred to by the testator (see *ante*, p. 230); it should also be shown whether they are to take as joint tenants or tenants in common, see *Horn* v. *Coleman*, 1 S. & G. 169; 22 L. J. Ch. 779; 96 R. R. 363; *Re Greenwood's Will*, 3 Gif. 390; *Re Ranking's Trusts*, L. R. 6 Eq. 601; and if as tenants in common, then that they are to be entitled in the shares prescribed by the statute (as doubtless is commonly the intention), as otherwise they would, though of different degrees, take in equal shares, *Richardson* v. *Richardson*, 14 Sim. 526; *Smith* v. *Palmer*, 7 Ha. 225; 82 R. R. 80; but see *Martin* v. *Glover*, 1 Col. 269; 66 R. R. 69; *Booth* v. *Vicars*, 1 Col. 6; 66 R. R. 1. In *Holloway* v. *Radcliffe*, 23 Be. 163; 26 L. J. Ch. 401, and *Fielden* v. *Ashworth*, L. R. 20 Eq. 410; 33 L. T. 197, the division was made in the statutory shares, notwithstanding the words "equally" or "share and share alike." Where a testator leaves property to the persons who at a time subsequent to his own death shall be his statutory next of kin, the class is an artificial class to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time, *Sturge* v. *Great Western Railway Co.*, 19 Ch. D. 44; 51 L. J. Ch. 185; 45 L. T. 787. See also *In re Nightingale*, '09, 1 Ch. 385; 78 L. J. Ch. 196; 100 L. T. 292.

A bequest to the next of kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin, as regards the period of ascertaining who are the persons intended; and if there is nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the will will be the persons to take, *Philps* v. *Evans*, 4 De G. & Sm. 188; *Wharton* v. *Barker*, 4 K. & J. 483, 502; *Vaux* v. *Henderson*, 1 Jac. & W. 388, n.; 21 R. R. 192; *In re Philp's Will*, L. R. 7 Eq. 151; 19 L. T. 713; *In re Rees*, 44 Ch. D. 484; 59 L. J. Ch. 305; 62 L. T. 362.

Under a bequest after the death of A. to the testator's next of kin according to the statute, A. takes a life interest by implication, *Re Springfield*, '94, 3 Ch. 603.

The expression "next of kin" means, in English law, the nearest blood relations in an ascending and descending line, whether of the whole or half blood, and this construction will be placed on that expression in the will of an English testator giving a legacy to the next of

**Notes to Prec. 24.**

kin of a legatee who is a subject of a foreign state, under the law of which relations of the half blood are not deemed next of kin, *In re Fergusson's Will*, '02, 1 Ch. 483; 71 L. J. Ch. 360.

Substitution of issue for child predeceasing testator.

(*g*) This substitutionary clause will make the share of each child dying in the testator's lifetime, and leaving issue surviving the testator, part of the estate of that child and will not substitute the issue for the child (sect. 33, *ante*, p. 77). The share in question will devolve according to the child's will, if any, or if none, will be distributable amongst the child's next of kin according to the statutes, subject, of course, to the child's debts. If it is the intention that the share should go to the issue of the child in question free from his or her debts and dispositions, such issue should be expressly substituted.

Remarks on clauses indemnifying trustees.

(*h*) The efficacy of this indemnity clause was tested in the case of *Wilkins* v. *Hogg*, 3 Gif. 116; affirmed, 10 W. R. 47; the trust fund was handed over by two trustees to their co-trustee for investment, but was immediately misapplied by him, and it was held that the two were not liable to make good the fund.

As to the liability of a trustee in respect of a breach of trust committed by his co-trustee, see *Brice* v. *Stokes*, 11 Ves. 319; 8 R. R. 164; and the notes to *Townley* v. *Sherborne*, in 2 W. & T. L. C. Eq. 870.

The ordinary indemnity clauses have little or no effect in restricting the responsibility of trustees; for instance, if an executor or trustee, on a representation by his co-executor or co-trustee that money is wanted to carry on the affairs of the trust, joins in a power of attorney for the sale of stock, or in the reconveyance of a mortgage, and permits the proceeds to go into the hands of the latter, the concurring executor or trustee would not be discharged from the duty of seeing to the due application of the money by a declaration in the will that the trustees shall not be answerable one for the other, but each for his own receipt and default only, or couched in other such commonplace terms. The trustee's responsibility is considered to arise, not from his mere junction in the act by which the money was placed at the disposal of the co-trustee, but from want of vigilance in preventing its subsequent misapplication, from which the clause in question does not profess to exempt him. In short, such clauses are viewed as part of the formal phraseology of the will, and not as indicating any special intention to interfere with the rules of equity which regulate the responsibility of trustees; and the value of the usual indemnity clauses inserted in wills was done away with by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 31), which imported into all wills an indemnity to trustees quite as wide as that provided for by the usual clauses. And see now the Trustee Act, 1893, *ante*, p. 144.

Remarks on the management of trust affairs.

If the consideration that the preservation of trust property is thrown upon each trustee were allowed its due weight, it would greatly alter the usual mode of conducting trust affairs, which is for one trustee to assume the entire or principal management, the rest taking no active part, but concurring, without inquiry, in the execution of deeds and in all other acts which the managing trustee suggests to be requisite for enabling him

**Notes to Prec. 24.**

to proceed in the execution of the trusts. When a testator intends that the trust business shall be thus managed, it seems to be proper that he should render the course a safe one to the less active trustee by a special clause of indemnity; but as such clauses operate to shift the loss consequential on a breach of trust from a co-trustee to the *cestuis que trust*, and thereby to impair the security arising from a plurality of trustees, they ought not to be inserted as matter of course.

(*i*) See note (*g*), Prec. XII.

## No. XXV.

WILL *of a* TRADER, *engaged in Trade in Partnership as a Builder, &c., providing for a Wife and Children.—Real and Personal Estates vested in Trustees for Sale and Conversion, with a Power to raise Money by Mortgage of the Real Estate.—Income to be applied in Payment of an Annuity to Wife during Widowhood, for the support of herself and Children; a reduced Annuity for Wife on Second Marriage; after her Death or Marriage, Annual Allowances for Maintenance of Children; Surplus to accumulate till Youngest Child attains Twenty-one.—Capital and Accumulations to Testator's Children and remoter Issue living at the Determination of the Trust for Accumulation, per Stirpes; if none, for Testator's Brothers and Sisters.—Powers to Trustees to advance Testator's Children before the Period of Distribution; also remoter Issue; to Purchase Land, take Building Leases, and let Furnished Lodging-houses; to make Allotments of Real Estate to Objects entitled in Distribution. — Provisions relating to Testator's Trade.—Right of Pre-emption given to Testator's Partner as to Share of Partnership Business; Powers to settle Accounts, sell Stock, &c., lend Money to Testator's Son on Bond.—Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I BEQUEATH to my wife [*name*] all the furniture (*a*) plate linen china glass pictures prints wines liquors (*b*) fuel and other household effects which shall at my death be in or about my dwelling-house at —— or belong to my establishment there I BEQUEATH to my wife the sum of £—— for housekeeping to be paid by four equal instalments at the end

Bequest to wife of furniture, &c.

**Prec. 25.**

Pecuniary legacy to wife for housekeeping.

Executors to provide mourning for wife, &c.

Devise of real estates to trustees upon trust to sell or to raise money by mortgage, as the purposes of the will may require.

Bequest of residue of personal estate to trustees, upon trust to convert and get in.

Trustees to invest the produce of real and personal estate.

Trusts of the aggregate fund arising from the real and personal estate;

—to pay annuity to wife during

of three six nine and twelve calendar months after my death I DIRECT my executors to provide my wife and my children and the wives of such of my sons as shall be married with such mourning as my executors shall in their discretion think reasonable I DEVISE the freehold copyhold (*c*) and leasehold estates to which I shall be entitled at my death unto and to the use of [*names &c. of trustees*] their heirs executors and administrators UPON TRUST when and as my trustees in order to effectuate any of the purposes of my will or with a view to the advantage of my estate or the more convenient division thereof among the persons entitled thereto shall in their discretion find it necessary or expedient so to do to sell my said estates or any part thereof or to raise money by mortgaging in fee or for years or by charging my said estates or any part thereof or by all or any of those means and to do and execute all acts and assurances requisite for effecting or facilitating any sale mortgage or charge pursuant to this trust I BEQUEATH the residue of the personal estate and effects (*d*) of every kind to which I shall be entitled at my death unto the said [*trustees*] UPON TRUST to sell convert into money get in and receive so much thereof as shall not consist of ready money or of such investments in stocks funds or securities (whether authorised investments or not) as my trustees shall think it desirable to continue AND I DIRECT my trustees to receive the money to arise from my said residue personal estate and stand possessed thereof together with the stocks funds and securities to be continued as last aforesaid upon the trusts hereinafter declared concerning the same AND as to the moneys to arise from the execution of the trusts hereinbefore contained concerning my real and residuary personal estate and not presently applicable to the purposes of my will I DIRECT my trustees to invest the same in their names (*e*) I DECLARE that all the trust moneys stocks funds and securities aforesaid shall form an aggregate fund and be held upon the trusts following (namely) UPON TRUST in the first place out of the annual produce thereof to pay an annuity of £—— to my wife during her life if she shall continue my widow she maintaining educating and bringing up to the satisfaction of my trustees my son or sons for the

Prec. 25.

time being under the age of twenty-one years and my daughter or daughters for the time being under that age not having been married And if she shall fail so to do I authorise my trustees in their discretion to retain and appropriate for that purpose so much of the said annuity as they shall think expedient and to pay the residue to my wife for her own support and maintenance And if my wife shall marry again then UPON TRUST to pay to her an annuity of £—— only during the remainder of her life without power of anticipation (*f*) AND after the death or marriage of my widow to raise and apply in or towards the maintenance education and bringing up each son of mine who shall be under the age of twenty-one years and each daughter of mine who shall be under that age not having been married the yearly sum of £—— till the age of —— years the yearly sum of £—— from the age of —— to —— years and thenceforth the yearly sum of £—— in such manner as my trustees shall in their discretion think fit AND I DIRECT the said annuity of £—— to be paid quarterly and the first portion to become payable at the end of three calendar months next after my death and the first payment of the said annuity of £—— and of the said yearly sum for maintenance to be made at the end of three calendar months next after the marriage or death of my widow AND I FURTHER DIRECT that as long as any child of mine shall be living and under the age of twenty-one years my trustees shall raise and pay quarterly to each daughter of mine who shall have attained the age of twenty-one years and shall not have been married the yearly sum of £—— with a proportionate part down to the cessation of such payment AND UPON FURTHER TRUST (*g*) to invest in the names of my trustees the surplus which after satisfying the said annuities and all expenses incident to the execution of the trusts hereby created shall from time to time remain in their hands of the yearly produce of the said fund and to accumulate at compound interest the income of the said aggregate fund for the term of twenty-one years from my death if any child of mine shall so long live and be under the age of twenty-one years I DIRECT my trustees on the termination of the said term of twenty-one years determinable as aforesaid (which determination is

widowhood, she maintaining, &c., the children;

—if she neglects, trustees may apply part of the annuity for that purpose;

—to pay to wife marrying again a reduced annuity;

—to apply, after the death or marriage of wife, certain allowances for maintenance of children, according to a scale of ages;

—annuities and maintenance to be paid quarterly;

—to accumulate the surplus income for twenty-one years from testator's death, if any child shall continue under age.

Trusts of the accumulated fund;

**Prec. 25.**

hereinafter referred to as the period of distribution) to stand possessed of the said aggregate fund with the accumulations thereof but subject to such of the principal trusts hereinbefore contained anterior to the trusts for accumulation as shall be then subsisting In trust for my children living at the period of distribution and the issue then living of my children dying before that period such objects to take as tenants in common according to the stocks (*h*) and not to the number of individuals composing the class the shares of children to be paid immediately and the shares of other issue being males at the age of twenty-one years or being females at that age or marriage And if there shall not be any object of the same trust or not any such object who shall become entitled to an absolutely vested interest then Upon trust to divide the said trust fund equally between my brothers and sisters [*names*] who shall be deemed to have vested interests in their respective shares on my death Provided always that it shall be lawful for my trustees at any time or times before the period of distribution to apply out of the said trust fund any sum or sums of money not exceeding in the whole £—— in or towards the establishment of each or any son of mine in any profession trade or business to be approved of by my trustees or his advancement in the world in any other manner which may appear to them expedient And also to advance to each daughter of mine who shall be married with their previous approbation in writing the sum of £—— on such her marriage (*i*) And I declare that the sums to be advanced to my said sons and daughters as aforesaid shall be taken in part satisfaction of the shares to which they or their issue may respectively become entitled of the said trust fund Provided also that it shall be lawful for my trustees to apply in or towards the advancement in the world of each male grandchild or more remote issue any part not exceeding one-half of the principal of his share Provided also that notwithstanding anything hereinbefore contained it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to invest any part of the said trust fund or the accumulations thereof in the purchase of any estates in the county of ——

—for children and issue living at the cessation of trust for accumulation, *per stirpes*;

—if no object of the preceding trust, then for testator's brothers and sisters equally.

Power to apply a limited sum for the advancement of each child of testator.

Power to purchase real estate, and take land on building leases.

of freehold or copyhold tenure or held for a term or terms of years of which [fifty] years at least shall be unexpired or in taking any ground or buildings in the same county on building repairing or improving leases in consideration of such fines or premiums at such rents and subject to such conditions as to my trustees shall seem expedient and the property to be so purchased and taken shall be vested in my trustees and be subject to the same trusts and provisions as my real estates hereinbefore devised PROVIDED ALSO that it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to prosecute or complete any buildings repairs or improvements which shall at my decease have been begun contracted for or projected by me in or upon any part or parts of my devised estates and to plan and execute any new or other buildings repairs or improvements in or upon any part or parts either of my devised estates or of the estates to be so purchased or taken as aforesaid and for those purposes to expend any part of the said trust fund and accumulations and to use and employ any materials which I shall possess or have contracted for at my death and to pull down and remove any buildings erected or to be erected upon any part of my devised estates or the estates to be so purchased or taken as aforesaid and either to use or sell the materials thereof PROVIDED ALSO that it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to let as lodging-houses any messuages erected or to be erected as aforesaid which shall have been let by me as lodging-houses or shall be adapted for that purpose upon such terms and in such manner as lettings of that nature are usually conducted in or near —— aforesaid And to invest any part of the said fund or accumulations in the purchase of furniture or other articles to be used in such lodging-houses and also to use therein the furniture and articles which shall at my death belong to any messuages then let or intended to be let as lodging-houses PROVIDED ALSO that in the meantime until the sale of my devised estates and of the estates to be purchased and taken as aforesaid the same shall for all the purposes of the trusts hereinbefore

Power to carry on building operations.

Power to let houses as lodging-houses and purchase furniture, &c.

Unsold real estate to be transmissible as personal estate.

**Prec. 25.**

contained be considered as money or personal estate and be transmissible accordingly and the rents and profits thereof be received by my trustees and be applicable to the same purposes and in the same manner as the yearly produce of the fund to arise from the sale thereof would be applicable by virtue of my will if such sale had actually taken place

Power to allot real estate, as such, to persons entitled to shares of the trust fund.

PROVIDED ALSO that if at the period of distribution any real estates shall be vested in my trustees then notwithstanding the trust for sale hereinbefore contained it shall be lawful for them in their discretion to allot the same or any part or parts thereof as real estate to any object or objects of the trusts hereinbefore contained in favour of my children and issue in full or in part satisfaction of the share or respective shares of such object or objects under the same trusts according to the value of the real estate to be so allotted such value to be ascertained by two surveyors to be appointed by my trustees or if such surveyors shall not agree thereon in writing within —— days after their appointment then by a third surveyor to be named by them as their umpire before commencing the valuation And for the convenience or equality of any such allotment or allotments to accept and make any mortgages or charges upon the allotted estates and my residuary real and personal estates respectively or any or either of them respectively And the real estate to be so allotted shall be subject to trusts corresponding as nearly as may be with the trusts hereinbefore contained concerning the share or respective shares in respect of which the allotment shall be made (*k*)

Right of pre-emption given to testator's partner as to shares of real estate belonging to the partnership.

PROVIDED ALSO that my trustees shall within —— calendar months next after my death cause an offer in writing to be made to my brother [*name*] of my share of the real estate belonging to us as partners in the business of —— at —— aforesaid at the value set upon the same share in the stock-book of the same partnership at the last stock-taking preceding my death PROVIDED NEVERTHELESS that if the said stock-taking shall have been taken more than twelve calendar months before my death then my share of the said real estate belonging to the said partnership shall be offered as aforesaid to my said brother at a valuation to be made by two competent and

indifferent persons as valuers one to be chosen by my said brother and the other by my trustees or if the said two valuers disagree by a third valuer to be chosen by the other two as their umpire before they enter upon the valuation And that if my said brother shall within one calendar month after such offer signify in writing signed by him to my trustees his desire to accept such offer then my trustees on having one moiety of the value ascertained in manner aforesaid paid or duly allowed in account to them and having the other moiety thereof either so paid or allowed or otherwise at the option of my said brother secured by a mortgage in fee of the same share to be paid in one payment or by instalments at any period or periods not exceeding —— years from my death with interest after the rate of —— per cent. per annum shall at the costs of my said brother convey the same share to him or as he shall direct without prejudice to any mortgage to be made as aforesaid but no purchaser under my will shall be concerned to take notice of this direction PROVIDED ALSO that it shall be lawful for my trustees in their discretion until the period of distribution to enter into any arrangement with [*testator's partners*] for succeeding to my share in the business carried on by them in partnership with me at —— aforesaid and for continuing such partnership business for the benefit of my estate for such period and upon such terms as to my trustees shall seem expedient and to employ for that purpose all or any part of the capital which shall at my death be employed by me in the same business or any additional capital (*l*) PROVIDED ALSO that it shall be lawful for my trustees to investigate arrange and settle all accounts and transactions whatsoever between me and any person or persons with whom I am or shall be concerned in any partnership or partnerships or between me and the representatives of any such person or persons and to wind up all the affairs of such partnership or partnerships and generally to do and execute all such acts matters and things as shall appear to my trustees to be necessary or expedient for effecting or facilitating the final settlement of all matters arising out of any partnership concerns in which I shall be engaged at my death or shall

Power enabling trustees to succeed testator in his share of partnership business.

Power to settle partnership accounts, &c.

**Prec. 25.**

Power to sell stock-in-trade, accept personal security and compound debts.

Power to lend money to testator's son on bond.

Devise of copyhold estates held by testator as trustee.

Appointment of executors and guardians.

at any former period have been engaged PROVIDED ALSO that it shall be lawful for my trustees at the risk of my estate to sell any part or parts of my personal estate embarked in trade at my death to any person or persons for money or upon credit and to accept such personal or other security and to give such time for payment of the same money or of any other money which shall be owing to me at my death as they in their discretion may think proper and compromise compound or submit to arbitration any debt or claim affecting my estate PROVIDED ALSO that it shall be lawful for my trustees with the consent in writing of my wife during her widowhood and after her death or marriage in their discretion to lend to my son [*name*] at the risk of my estate any sum or sums of money not exceeding in the whole £—— sterling upon his bond at interest after the rate of five per cent. per annum for such period as my trustees shall think reasonable I DEVISE all the copyhold hereditaments which at my death shall be vested in me as trustee and to which I shall have been admitted to the said [*trustees*] subject to the trusts and equities affecting the same respectively (*m*) I APPOINT the said [*trustees*] to be executors of this my will AND I nominate the trustees or trustee for the time being of my will to be guardians or guardian of the persons and estates of my children during their respective minorities (*n*) I REVOKE all prior wills and testamentary dispositions IN WITNESS &c.

**NOTES to Precedent XXV.**

(*a*) See note (*b*), Prec. XV.

*Bona quæ ipso usu consumuntur.*

Consumable articles.

(*b*) Wines and other consumable stores should always be given to the legatee absolutely, and no attempt be made to create life or other temporary interests in property of this description, of which the enjoyment consists in their consumption. Indeed, the effect of giving a life interest in consumable articles is to entitle the legatee absolutely, *Randall* v. *Russell*, 3 Mer. 194; 17 R. R. 56; *Andrew* v. *Andrew*, 1 Col. 690; see also *Twining* v. *Powell*, 2 Coll. 262; 70 R. R. 210. But this does not apply to the stock-in-trade of a wine merchant, *Phillips* v. *Beal*, 32 Be. 25, or to farming stock and implements of husbandry, *Groves* v. *Wright*, 2 K. & J. 347; *Myers* v. *Washbrook*, '01, 1 K. B. 360; 70 L. J. K. B. 357; 83 L. T. 633, or other consumable articles forming part of the stock-in-trade of a business bequeathed to one for life,

**Notes to Prec. 25.**

*Cockayne* v. *Harrison*, L. R. 13 Eq. 432; 26 L. T. 385. A gift of farming implements and stock to a person for life, but with a direction that he is not to be liable to account for depreciation, carries the absolute interest, *Breton* v. *Mockett*, 9 Ch. D. 95; 47 L. J. Ch. 754. As to wearing apparel, see *Re Hall's Will*, 1 Jur. N. S. 974.

A distinction, however, is to be taken between a specific and a residuary gift for life of goods *quæ ipso usu consummuntur*: if the gift is specific, it is an absolute gift of the property, but if residuary, the things must be sold, the produce invested, and the interest thereof paid to the legatee for life. See 2 Wms. Exors. 1127.

Leaseholds, copyholds, reversions and remainders, pass under a general devise, when.

(*c*) As to excepting copyholds from a general devise and giving the trustees a power of sale over them in the first instance, see *ante*, pp. 159, 171. The Wills Act materially affects and alters the operation of a general devise. For, before that statute, when such a devise was intended to comprise leaseholds for years, it was necessary that they should be expressly mentioned, as it would not otherwise have extended to them, unless the testator, when he made his will, had no freeholds to which the devise could apply, *Rose* v. *Bartlett*, Cro. Car. 292; *Thompson* v. *Lady Lawley*, 2 B. & P. 303; 5 R. R. 595; *Weigall* v. *Brome*, 6 Sim. 99; 38 R. R. 89. Now, however, by such a devise, leasehold lands will pass, provided the words would have been sufficient to describe them if the testator had not possessed freehold land (unless a contrary intention appears from the will, ss. 26, 27, *ante*, pp. 64, 65). And, by the last of these sections, the further operation is attributed to such a devise of comprising and disposing of, by way of execution of a power, all lands to which the description shall extend, which the testator has power to appoint in any manner he thinks proper.

Reversions and remainders in fee also pass under such devises without specification, unless excluded by the inapplicability of some of the limitations in the devise, *Church* v. *Mundy*, 15 Ves. 396; *Doe* v. *Bartle*, 5 B. & Al. 492; *Doe* v. *Carpenter*, 16 Q. B. 181; *Ford* v. *Ford*, 6 Ha. 486; 77 R. R. 203; see also *Doe* v. *Weatherby*, 11 Ea. 322; *Doe* v. *Fossick*, 1 B. & Ad. 186. And on the operation of a general devise of realty, see Jarm. Wills, Ch. XX.

Inexpediency of associating particular with general words of description.

(*d*) It was common, in residuary clauses in wills, to find, in addition to the general words here used, a long enumeration of particulars of which the personal estate then actually did or might be supposed to consist. Of all kinds of verbosity this seems to be the most inexpedient, if not pernicious; for if these words are not absolutely nugatory (which they generally are, *King* v. *George*, 5 Ch. D. 627; 46 L. J. Ch. 670; 36 L. T. 759; *In re Fleetwood*, 15 Ch. D. 594; 49 L. J. Ch. 514) they sometimes give rise to the question whether the residuary legatee is not to stand in the favoured position of a specific legatee in regard to the enumerated articles; and such question becomes especially important where there is a deficiency of assets to pay all the debts and legacies. It ought always to be prevented by an unequivocal expression of intention where the residuary legatee is to take any of the personal property in the

**Notes to Prec. 25.**

character of a specific legatee; and by framing the residuary bequest in the ordinary general and comprehensive language, where he is not.

(*e*) See note (*b*), Prec. IV.

Inalienable trust for married women.

(*f*) The wife might avoid this restriction by assigning the annuity while discovert (*ante*, p. 242); to prevent which, however, it might, in the event of her doing so, be made to cease by a clause declaring that in case she, while discovert, shall do or suffer any act or thing whereby the said annuity, or any part thereof, shall be assigned, charged, or incumbered, the same annuity shall wholly cease. Some forms in common use provide for cesser in case the woman during discoverture "shall attempt to alien or incumber." As to a proviso of forfeiture in case of doing or "attempting" to do a certain act, see *Wade* v. *Hopkinson*, 19 Be. 613. See also *Graham* v. *Lee*, 23 Be. 388; 26 L. J. Ch. 395; *Jones* v. *Wyse*, 2 Ke. 285; 7 L. J. Ch. 107.

Accumulation of income, how far restrained.

(*g*) The prospective accumulation of income is restrained by 39 & 40 Geo. 3, c. 98 (usually called the *Thellusson Act*, in reference to the gentleman whose extraordinary will supplied occasion for it). The statute enacts, "that no person or persons shall, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the time of the death of the grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." By sect. 2, the Act is not to extend "to any provision for payment of debts of any grantor settlor or divisor or other person or persons, or to any provision for raising portions for any child or children of any grantor settlor or devisor of any child or children of any person taking any interest under any such conveyance settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenement." The Act now applies to heritable property in Scotland (11 & 12 Vict. c. 36, s. 41).

Thellusson Act, 39 & 40 Geo. 3, c. 98.

Exception.

**Notes to Prec. 25.**

If the allowed term is exceeded, the accumulation is nevertheless good *pro tanto*, *Griffiths* v. *Vere*, 9 Ves. 127; *Longdon* v. *Simson*, 12 Ves. 295; *Re Lady Rosslyn's Trust*, 16 Sim. 391; 18 L. J. Ch. 98; but a trust for accumulation which was bad before the statute is of course still so, *Boughton* v. *James*, 1 Col. 45; *Boughton* v. *Boughton*, 1 H. L. C. 406; 73 R. R. 116; *Browne* v. *Stoughton*, 14 Sim. 369; 65 R. R. 609; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; 19 L. J. Ch. 126; 83 R. R. 325. And a trust which is not void as a perpetuity may yet be void for uncertainty, *In re Moore*, '01, 1 Ch. 936; 70 L. J. Ch. 358; 84 L. T. 501.

Trusts for accumulation.

Implied no less than express trusts are within the statute. Thus, by way of illustrating both these positions, suppose a testator to give his real and personal estate to such of the children of A. as shall attain the age of twenty-one years. This would create an implied accumulating trust until the vesting of the gift, which, if A. had no child at the testator's decease, would exceed the allowed limit; and the effect would be that for twenty-one years from the testator's death the accumulation would proceed under the authority of the statute; and from that period until the vesting, the income of the realty would go to the testator's heir as real estate undisposed of, and the income of the personalty to the next of kin as personal estate undisposed of. And where a testator creates a charge which has the effect of carrying an accumulation for a period exceeding the statutory limit, it will be *pro tanto* void, though the testator has not in terms directed that the income shall accumulate, *Shaw* v. *Rhodes*, 1 M. & C. 135; *Evans* v. *Hellier*, 5 C. & F. 114; *Tench* v. *Cheese*, 6 D. M. & G. 453; 24 L. J. Ch. 716; 106 R. R. 147; *Morgan* v. *Morgan*, 4 De G. & S. 164; 20 L. J. Ch. 109, 441; 87 R. R. 333. See also 5 Dav. Conv. 328. But where, subject to a direction to accumulate, real estate is devised to several in succession, the direction to accumulate operates as a charge on the successive estates, and accumulations made after twenty-one years from the testator's death belong not to his heir-in-law, but from time to time to the several persons entitled to the rents and profits, *Re Clulow's Trust*, 1 J. & H. 639; 28 L. J. Ch. 696; and see *Harbin* v. *Masterman*, '94, 2 Ch. 184; 63 L. J. Ch. 388; 70 L. T. 357; affd., '95, A. C. 186; 64 L. J. Ch. 369; 72 L. T. 431.

Implied trusts.

A trust for accumulation, however short, will be void unless it falls within twenty-one years from the testator's decease, or constitutes one of the alternative purposes or periods of accumulation allowed by the statute. For instance, if a testator should give his real and personal estate to A. for life, and then to such of the children of B. as during the life of A. or afterwards should attain the age of twenty-one years, accumulation would not be allowed for twenty-one years from the decease of A., but only for so much, if any, of the term of twenty-one years, computed from the testator's decease, as should happen to be unexpired at A.'s decease, *Attorney-General* v. *Poulden*, 3 Ha. 555. It will be observed that the Act authorises accumulation during any of the four periods, and only for one of those periods, *Wilson* v. *Wilson*, 1 Sim., N. S. 281; 20 L. J. Ch. 365; *Jagger* v. *Jagger*, 25 Ch. D. 729; 53 L. J.

Trusts for accumulation.

**Notes to Prec. 25.**

Ch. 201; 49 L. T. 667. The last mentioned of the alternative periods is the minority of any person, who, under the uses or trusts, would, if of full age, be entitled to the rents, &c.; which clause has been decided not to extend to a trust for accumulating income during the minority of an unborn person to whom, at majority, the original fund and the accumulations are given, *Haley* v. *Bannister*, 4 Mad. 275; 20 R. R. 299. But the authority of *Haley* v. *Bannister* has been shaken by *In re Cattell*, '07, 1 Ch. 567; 76 L. J. Ch. 242; 96 L. T. 612. See also *Ellis* v. *Maxwell*, 3 Be. 587; 52 R. R. 235; *Bryan* v. *Collins*, 16 Be. 17; 96 R. R. 6; and the remarks on those cases in Jarm. Wills, 274.

Trusts for accumulation.

In *In re Pope*, '01, 1 Ch. 64; 70 L. J. Ch. 26, the question was whether certain surplus rents accumulated under a trust for accumulation were to be treated, after the expiration of the permitted period of accumulation, as capital or income as between tenant for life and remainderman.

On the question whether accumulations, not expressly directed by the will, but arising by operation of law, are within the Act, see *Mathews* v. *Keble*, L. R. 3 Ch. 691; 37 L. J. Ch. 657; 19 L. T. 243, 246. As to accumulations of a fund which was charged on real estate in exercise of a power, see *Simmons* v. *Pitt*, L. R. 8 Ch. 978; 29 L. T. 320.

As before intimated, of a trust for accumulation which before the Thellusson Act would have been good, "so much as is now within the Act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act"; *per* Lord Eldon, in *Marshall* v. *Holloway*, 2 Sw. 450; 19 R. R. 94. The period for the distribution of accumulations is not accelerated by the operation of the Act in shortening the time during which such accumulations are to be made, *Nettleton* v. *Stephenson*, 3 De G. & S. 366; 18 L. J. Ch. 191; 83 R. R. 60. As to stopping accumulation, to which, at the end of the period allowed by the Act, certain charities would be entitled, see *Harbin* v. *Masterman*, '94, 2 Ch. 184; 63 L. J. Ch. 388; 70 L. T. 357, and '95, A. C. 186; 64 L. J. Ch. 369; 72 L. T. 431.

Accumulations allowed; for payment of debts,

As to the exceptional cases in which accumulations are permitted: (1) for the payment of debts. The doctrine of Sir G. J. Turner, V.-C., in *Lord Barrington* v. *Liddell*, 10 Ha. 429, that the debts provided for must be the debts of the testator himself, was overruled by Lord St. Leonards, 2 D. M. & G. 480; 22 L. J. Ch. 1. Accumulation for payment of debts and legacies for a period of thirty years has been held allowable, the legacies being to persons in existence, *Williams* v. *Lewis*, 1 H. L. C. 1013; 28 L. J. Ch. 505. See also, as to provisions for the payment of debts, *Bateman* v. *Hotchkin*, 10 Be. 426; 16 L. J. Ch. 514; 76 R. R. 165; *Varlo* v. *Faden*, 1 D. F. & J. 211; 29 L. J. Ch. 230; 1 L. T. 176; *Tewart* v. *Lawson*, L. R. 18 Eq. 490; *In re Heathcote*, '04, 1 Ch. 826; 73 L. J. Ch. 543; 90 L. T. 505. (2) As to the exception in favour of portions, and what constitutes a portion within the meaning

for raising portions for children.

**Notes to Prec. 25.**

of the Act, see *Bourne* v. *Buckton*, 2 Sim. N. S. 91; 21 L. J. Ch. 193; *Jones* v. *Maggs*, 9 Ha. 605; 22 L. J. Ch. 90; *Burt* v. *Sturt*, 10 Ha. 415; 22 L. J. Ch. 1071; *Middleton* v. *Losh*, 1 S. & G. 61; 22 L. J. Ch. 422; 96 R. R. 318; *Wildes* v. *Davies*, 1 S. & G. 475; 22 L. J. Ch. 495; 96 R. R. 445; *Edwards* v. *Tuck*, 3 D. M. & G. 40; 23 L. J. Ch. 204; *Beech* v. *Lord St. Vincent*, 3 De G. & S. 678; 19 L. J. Ch. 130; *Drewett* v. *Pollard*, 27 Be. 196; *Heywood* v. *Heywood*, 29 Be. 9; 30 L. J. Ch. 155; *Watt* v. *Wood*, 2 Dr. & S. 56; 31 L. J. Ch. 338; *In re Stephens*, '04, 1 Ch. 322; 73 L. J. Ch. 3; 91 L. T. 167.

The Act is not applicable to real estate in Ireland or to the rents thereof, but it is applicable to the income arising from accumulations of such rents: see *Ellis* v. *Maxwell*, 12 Be. 104; 85 R. R. 34. The Act applies to chattels real situate in England, though the testator is domiciled in Ireland, *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

A direction by will to pay the premiums on a life-insurance policy is valid for the whole life insured, and is not an accumulation restricted by the Act to twenty-one years, *Bassil* v. *Lister*, 9 Ha. 177; 20 L. J. Ch. 641.

Nor is a trust in a will for the application of the income of an estate "in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property" a trust for accumulation of the income within the Act. Such a trust is valid, and the income may therefore be so applied although the period of twenty-one years from the death of the testator may have expired, *Vine* v. *Raleigh*, '91, 2 Ch. 13; 60 L. J. Ch. 675; *In re Mason*, '91, 3 Ch. 467; 61 L. J. Ch. 25.

A direction in a will to apply a portion of the rents of the testator's leaseholds in keeping on foot a policy of insurance to secure the replacement at the expiration of the terms for which the lease was held of the capital which would be lost by not selling the leaseholds is not an accumulation within the meaning of the Act, and is therefore valid notwithstanding that at the testator's death the unexpired residue of the term may exceed twenty-one years, *In re Gardiner*, '01, 1 Ch. 697; 70 L. J. Ch. 407.

See further, on the subject of accumulations and the Thellusson Act, the notes to *Griffiths* v. *Vere*, 9 Ves. 127, in Tud. L. C. R. P.; Jarm. Wills, Ch. IX., sect. 3.

By the Accumulation Act, 1892 (55 & 56 Vict. c. 58), accumulation has been further restricted. By that statute, it is enacted as follows:—"No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only for any longer period than during the minority or respective minorities of any person or persons, who under the use or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." A direction to accumulate for the purchase of real

**Notes to Prec. 25.**

estate is a direction to accumulate "for the purchase of land only" within the meaning of this Act, and is consequently void, *In re Clutterbuck*, '01, 2 Ch. 285; 70 L. J. Ch. 614; 84 L. T. 757.

(*h*) These words would apply to every generation; all the persons who take must do so according to the stocks, and this runs through the whole range of the descents, *Robinson* v. *Shepherd*, 4 D. J. & S. 129; *Gibson* v. *Fisher*, L. R. 5 Eq. 51; 37 L. J. Ch. 67; *In re Wilson*, 24 Ch. D. 664; 53 L. J. Ch. 130.

As to conditions restraining marriage.

(*i*) By the civil law, conditions restraining marriages were absolutely void, and marriage generally was a sufficient compliance with a condition requiring marriage with consent, or with a designated individual, or under certain other prescribed circumstances (Godolph. p. 3, c. 17). Our law has not evinced the same impatience of nuptial restrictions; for it is clear that a condition is legal which inhibits marriage until majority or any other reasonable age, or which requires consent, or restrains marriage with any particular individual, or even with a very large class, for instance, a native of Scotland, *Perrin* v. *Lyon*, 9 Ea. 170; 9 R. R. 520; or a Papist, *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295. See also *Hodgson* v. *Halford*, 11 Ch. D. 959; 48 L. J. Ch. 548, where a forfeiture on marriage with a Christian took effect; and *Jenner* v. *Turner*, 16 Ch. D. 188; 50 L. J. Ch. 161; 43 L. T. 468, where a condition restraining marriage with a domestic servant was held valid.

Gift until marriage, valid.

The law of England does not prohibit the gift of an annuity or other interest in the income of property, real or personal, until marriage; for though a benefit or interest once given cannot be devested or taken away upon marriage, it seems impossible to maintain that a trust or gift which in its original creation embraced only the period of discoverture can be held to confer on the *cestui que trust* or legatee a title, when she has by marriage ceased to answer the description which the testator has annexed to his gift. In such a case, to hold the legatee to be entitled after marriage would be not merely to vacate a condition which the testator has engrafted on the original gift, but to extend and enlarge the original gift itself beyond the limits prescribed by its author. See *Webb* v. *Grace*, 2 Ph. 701; 18 L. J. Ch. 13; *Andrew* v. *Andrew*, 1 Col. 690; *Morley* v. *Rennoldson*, 2 Ha. 570; 63 R. R. 236; *Heath* v. *Lewis*, 3 D. M. & G. 954; 22 L. J. Ch. 721; 98 R. R. 386; *Potter* v. *Richards*, 24 L. J. Ch. 488; 101 R. R. 867; *Tricker* v. *Kingsbury*, 7 W. R. 652.

Efficacy of gift over in rendering condition to ask consent effective.

The law of England, however, has admitted the principle of the civil law to this extent, that it treats as nugatory a condition attached to a gift of personalty to ask consent, unless accompanied by a bequest over in default, *Bellasis* v. *Ermine*, 1 Ch. Cas. 22; *Aston* v. *Aston*, 2 Ver. 452; *Clarke* v. *Parker*, 19 Ves. 13; 12 R. R. 124; so, also, if the gift is a mixed fund, consisting of personalty and proceeds of sale of realty, *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; 89 R. R. 284; *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510; 43 L. J. Ch. 669; and it would seem that the condition would be void if the gift were of proceeds of sale of realty only. And a residuary bequest is not considered such a bequest over, *Semphill* v.

**Notes to Prec. 25.**

*Bayley*, Pre. Ch. 562; *Paget* v. *Haywood*, cited 1 Atk. 378; *Scott* v. *Tyler*, 2 Br. C. 431; unless there is an express direction that the forfeited legacy shall fall into the residue, *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108; 17 R. R. 34. See also *In re Whiting's Settlement*, '05, 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821. The doctrine admits, however, of the three following material exceptions: 1*st*. Where the legatee takes an alternative legacy, *i.e.* a legacy in the event of not marrying with consent, *Creagh* v. *Wilson*, 2 Ver. 572; *Gillet* v. *Wray*, 1 P. W. 284; *In re Nourse*, '99, 1 Ch. 63; 68 L. J. Ch. 15; 79 L. T. 376. 2*ndly*. Where marriage with consent is only one of several events on the happening of which the legatee will be entitled to the legacy in question; as where it is given on the attainment of a particular age or marriage with consent, which shall first happen, *Hemmings* v. *Munckley*, 1 Br. C. 304; 1 Cox, 38; or on attaining a particular age unmarried, or marrying with consent before such age, *Scott* v. *Tyler*, 2 Br. C. 431; *Reynish* v. *Martin*, 3 Atk. 330. In the former of the cited cases, a legatee dying before the specified age without having been married, and in the latter, a legatee marrying before such age without consent, was held not to be entitled. Where the consent of certain persons is required, and they die before the time for asking their consent arrives, the condition becomes impossible, and the legatee takes the legacy. If the consent of several is required and one of them dies, the consent of the survivors must be obtained, *Graydon* v. *Hicks*, 2 Atk. 18; *Grant* v. *Dyer*, 2 Dow, 73; 14 R. R. 118; *Aislabie* v. *Rice*, 3 Mad. 256; 18 R. R. 230; *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753; 45 L. J. Ch. 519; 34 L. T. 551. Where the marriage is to be with consent of her guardian or guardians, marriage without the consent of any guardian, there being none, is not a compliance with the condition, since guardians might be appointed by the Court, *Re Brown*, 18 Ch. D. 61; 50 L. J. Ch. 724; 44 L. T. 757. The 3*rd* and last instance of exception to the rule that marriage conditions requiring consent are *in terrorem* only is where they are confined to marriage during minority, *Stackpole* v. *Beaumont*, 3 Ves. 89; 3 R. R. 52; or other reasonable age; see *Younge* v. *Furse*, 8 D. M. & G. 756, where a condition in restraint of marriage before twenty-eight was held valid. In these several excepted instances the legatee must strictly comply with the condition which the testator has annexed to his bounty, even though there is no bequest over in default.

Instances of condition requiring consent to marriage being valid without a bequest over.

Death of persons whose consent is required.

It is satisfactory to find that the numerous and refined distinctions respecting marriage conditions, and the efficacy of a gift over on non-compliance with the conditions, which have obtained in regard to personal legacies, have not been applied to devises of real estate, including under this denomination pecuniary charges on land. Real estate is governed by the rules of the common law, and never having been subject to the jurisdiction of the Ecclesiastical Courts, is not influenced by the rules of the civil law, *Jones* v. *Jones*, 1 Q. B. D. 279; 45 L. J. Q. B. 166; 34 L. T. 243. A condition prohibiting marriage generally is void as being against public policy, whether the gift to which it is attached be

Marriage conditions in reference to real estate.

**Notes to Prec. 25.**

Marriage conditions.

of realty or personalty, *Perrin* v. *Lyon*, 9 Ea. 183; 9 R. R. 520; *Morley* v. *Rennoldson*, 2 Ha. 570; 62 R. R. 236 (which case was again before the Court, '95, 1 Ch. 449; 64 L. J. Ch. 485; 72 L. T. 308); but a condition in restraint of second marriage is not void, in the case either of a woman, *Newton* v. *Marsden*, 2 J. & H. 356; 31 L. J. Ch. 690; 6 L. T. 155; or of a man, *Allen* v. *Jackson*, 1 Ch. D. 399; 45 L. J. Ch. 310; 33 L. T. 713. An interesting instance of an unavailing effort to avoid the condition restraining a second marriage is given in *In re Rutter*, '07, 2 Ch. 592; 77 L. J. Ch. 34; 97 L. T. 883. A covenant by a spinster not to revoke her will is not void on the ground that, marriage being a revocation, such a covenant is in restraint of marriage, *Robinson* v. *Ommanney*, 23 Ch. D. 285; 52 L. J. Ch. 440; 49 L. T. 19. A devise on condition of marrying with consent—such restraint of marriage being particular, a partial and reasonable restraint, and the condition being precedent—will not take effect unless the condition is strictly complied with, whether there is a devise over or no, *Poulet* v. *Poulet*, 1 Ver. 204; *Lord Salisbury's case*, 2 Ven. 397; *Bertie* v. *Lord Falkland*, 3 Ch. Cas. 129; 2 Ver. 333; *Pulling* v. *Reddy*, 1 Wils. 21; *Harvey* v. *Aston*, 1 Atk. 361; and if marriage with consent is a condition subsequent, a breach of the condition will devest the estate, *Fry* v. *Porter*, 1 Ch. Cas. 138; unless the condition becomes impossible to be performed, in which case the estate becomes absolute. It may happen that a sum of money payable out of land on marriage with consent, in aid of the personal estate, may at one and the same time fail as a charge on the realty, and yet be payable as a personal legacy. Such an instance occurred in *Reynish* v. *Martin*, 3 Atk. 330, where a testatrix willed that if her daughter Mary married with the consent of her trustees, then, and not otherwise, she gave her 800*l.*; and the legatee was also to receive 30*l.* yearly while sole and unmarried; the testatrix charged her real estate with legacies; Mary married without consent, and Lord Hardwick held that the 800*l.* was payable as a legacy of personal estate, but not as a charge upon the realty.

Where a testator devised real estate to his son and limited the same "if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants," the son having married such a gentlewoman and having complied with the condition, it was held that an estate in special tail male was created, *Pelham-Clinton* v. *Duke of Newcastle*, '03, A. C. 111; 72 L. J. Ch. 424; 88 L. T. 273.

Effect of circumstances occurring in the testator's lifetime.

A change of circumstances in the lifetime of the testator sometimes has a material effect upon conditions restraining marriage. Thus, if a parent gives a legacy to his daughters, provided they marry with the consent of his trustees, this proviso would be held not to apply to a daughter who had subsequently married in his lifetime with his own consent, *Clarke* v. *Berkeley*, 2 Ver. 720; *Parnell* v. *Lyon*, 1 V. & B. 479; 12 R. R. 274; even though the testator's approbation was posterior to the marriage, *Wheeler* v. *Warner*, 1 S. & S. 304; or though the daughter was a widow at his death, *Crommelin* v. *Crommelin*, 3 Ves.

**Notes to Prec. 25.**

Marriage conditions.

227. Also where under a clause in a will the interest of a child of the testator who should contract a marriage forbidden by the will was "thenceforth to cease and determine," it was held that such a restriction did not apply to the child who after the date of the will, but before the testator's death, had contracted a forbidden marriage, *Chapman* v. *Perkins*, '05, App. Cas. 106; 74 L. J. Ch. 331; 92 L. T. 372. See also *Smith* v. *Cowdery*, 2 S. & S. 358; 25 R. R. 221; *Davis* v. *Angel*, 31 Be. 223; *Tweedale* v. *Tweedale*, 7 Ch. D. 633; 38 L. T. 137.

A legacy to a person so long as she shall remain unmarried has been held not to belong to a person who, subsequently to the will, married in the testator's lifetime, *Andrew* v. *Andrew*, 1 Col. 690. But if the legatee was married at the date of the will, though that fact was unknown to the testator, she is absolutely entitled, *Rishton* v. *Cobb*, 5 M. & C. 145; 48 R. R. 256. This case was, however, doubted in *In re Boddington*, 25 Ch. D. 685; 53 L. J. Ch. 475; 50 L. T. 761, where there was a bequest of an annuity to testator's wife "so long as she shall continue my widow and unmarried." After the date of the will the marriage was declared null, and the testator died subsequently. The lady was held not to be entitled to the bequest, as not being testator's widow. This case was followed in *In re Kettlewell*, 98 L. T. 23. There is, however, a secondary meaning to be attached to the term "widow," if the evidence adduced can support it, as was shown in the case of *In re Wagstaff*, '08, 1 Ch. 162; 77 L. J. Ch. 19; 98 L. T. 149. But Farwell, J., followed *Rishton* v. *Cobb* (*ubi sup.*) in *In re Howard*, '01, 1 Ch. 412; 70 L. J. Ch. 317; 84 L. T. 296. Property devised to testator's daughter for life, and after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life," was held to pass to one to whom the daughter had been married, though he had subsequently divorced her and married again, in the lifetime of the daughter whom he survived, *Bullmore* v. *Wynter*, 22 Ch. D. 619; 52 L. J. Ch. 456; 48 L. T. 309. A bequest to a daughter "for her life or until her marriage, and, after her decease or marriage, which shall first happen," upon trusts for the benefit of her children by two husbands, both then deceased—the daughter having afterwards, in testator's lifetime, married a third husband—was held to entitle the daughter to the income during her life or until a fourth marriage, *Bullock* v. *Bennett*, 1 K. & J. 315; but this decision was reversed by the Lords Justices, 7 D. M. & G. 283, who held that the 24th section of the Wills Act applies not to the objects of testator's bounty, but *only* to the property comprised in the will. See *ante*, p. 57.

A testator gave an annuity to his daughter for the life of his wife, but in case the daughter should cohabit with her husband, the same to cease so long as she should so cohabit; he also gave one-third of the interest of certain personalty to her during such time as she should live apart from her husband, but if she should at any time cohabit with him, testator divided the same one-third between two other persons: at the date of the will the daughter was living apart from, but before the death of the

**Notes to Prec. 25.**

testator she cohabited with, her husband, and continued to do so down to the testator's death; it was held by Knight-Bruce, V.-C., that the daughter was entitled to the annuity and one-third discharged of the condition, *Wren* v. *Bradley*, 2 De G. & S. 49; 79 R. R. 120; and see *Brown* v. *Peck*, 1 Ed. 140; *Bean* v. *Griffiths*, 1 Jur. N. S. 1045; 102 R. R. 924; *In re Moore*, 39 Ch. D. 116; 57 L. J. Ch. 936; 59 L. T. 681.

Marriage conditions.

Enough has been stated to show the necessity for care and explicitness in preparing marriage conditions, and that, to render conditions requiring consent effectual, where annexed to bequests of personal property, they should be accompanied (unless in the excepted cases before noticed) with an express bequest over in the event of marriage without consent. Indeed, considering the litigation to which conditions requiring consent have given rise (for the present note embraces only a small portion of the questions that have been raised concerning them), and the nature of the duty which they impose upon, and of the power which they place in the hands of, trustees, it seems in general the more prudent course not to encourage testators in the imposition of such restraints.

*Scott* v. *Tyler* is the leading case on the validity or invalidity of conditions in restraint of marriage annexed to a gift. See that case, and the notes thereto, in 2 Tud. L. C. Eq. See also 2 Jarm. Wills, Ch. XXVII., sect. 9.

Discretionary powers of settlement.

(*k*) As to discretionary powers of making settlements vested in trustees, see *Lancashire* v. *Lancashire*, 2 Ph. 657; *White* v. *Briggs*, *ib.* 583; 78 R. R. 203. In cases of executory trusts, the Court moulds the trusts in accordance with the intention of the creator of the trusts, which intention, in the case of executory trusts in wills, must be gathered from the words of the will alone. Where the trusts and limitations of land to be purchased by the trustees are expressly declared by the testator, the Court has no authority to make them different from what they would be at law, *Austen* v. *Taylor*, 1 Ed. 361; *Fullerton* v. *Martin*, 1 Dr. & S. 31; 29 L. J. Ch. 469. But the general intent of a testator in creating an executory trust governs the preparation of the settlement, and the manner of executing the trust must be guided by the object of the author of the trust, if such object can be legally carried into effect, *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543; 39 L. J. Ch. 505; and see *Viscount Holmesdale* v. *West*, L. R. 12 Eq. 280; 40 L. J. Ch. 795; and if the testator has not been his own conveyancer, and has left his intention to be made out from general expressions, the Court is not bound to construe technical terms with legal strictness, *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1; 23 L. J. Ch. 348; 94 R. R. 1; *Thompson* v. *Fisher*, L. R. 10 Eq. 207; for instance, it will, if there is sufficient indication of the testator's intention, hold "heirs of the body," or similar words, to be words of purchase and not of limitation, and will decree a strict settlement, *Leonard* v. *Earl of Sussex*, 2 Ver. 526; *Bastard* v. *Proby*, 2 Cox, 6; *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1;

Executory trusts in wills of realty.

**Notes to Prec. 25.**

*Shelton* v. *Watson*, 16 Sim. 543; 80 R. R. 139; still more readily will it do so when the word "issue" is employed, *Grier* v. *Grier*, L. R. 5 H. L. 688. In such cases, "heirs of the body" or "issue" include daughters as well as sons; thus in *Trevor* v. *Trevor*, 1 H. L. C. 239; 73 R. R. 58, a testator devised real estates to trustees, in trust to settle and convey them to G. R. for life, with remainder to his issue in tail male in strict settlement; in default of such issue, the estates were to go over; G. R. had no son, but had several daughters, all of whom were born after the testator's death; it was held, that the words "in tail male" were descriptive not of the issue, but of the interest they were to take, and that the daughters were entitled to take under the limitation in remainder as tenants in common in tail male. See further as to "issue," *Berry* v. *Fisher*, '03, 1 Ir. R. 484; *Edyvean* v. *Archer*, '03, A. C. 379; 72 L. J. P. C. 85; 89 L. T. 4; *In re Rawlinson*, '09, 2 Ch. 36; 78 L. J. Ch. 443; 100 L. T. 509. For the mode of effectuating a direction to entail real and personal estate, see *Tennent* v. *Tennent*, 1 Dru. 161; 67 R. R. 205; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; 21 R. R. 228. Where an executory trust, if carried out literally, would be void, as, *e.g.* for infringing on the rule against perpetuities, the Court will execute the trust *cy-près*, and direct a settlement as strict as the law allows, *Humberston* v. *Humberston*, 1 P. W. 332.

Direction to entail.

*Cy-près.*

Where a settlement is directed with the usual or proper powers, the Court will order the insertion of such powers as are necessary, and contribute to the better enjoyment of the estate, and are advantageous to all parties interested; see *Hill* v. *Hill*, 6 Sim. 144; but powers conferring personal advantages on particular persons, such as a power to jointure a future wife, *Duke of Bedford* v. *Marquis of Abercorn*, 1 M. & C. 312; or to raise portions, *Higginson* v. *Barneby*, 2 S. & S. 518; 25 R. R. 256, will not be inserted; and life estates will not be without impeachment of waste, *Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthirst*, L. R. 10 Eq. 259; 39 L. J. Ch. 650; 23 L. T. 761. See also *Clive* v. *Clive*, L. R. 7 Ch. 433; 41 L. J. Ch. 386; 26 L. T. 409, as to the inconsistency of a restraint on anticipation with a life estate without impeachment of waste. As to the insertion of powers where no direction to that effect is given, see *Wheate* v. *Hall*, 17 Ves. 85; *Brewster* v. *Angell*, 1 J. & W. 628; *Turner* v. *Sargent*, 17 Be. 515; 99 R. R. 269; *Byam* v. *Byam*, 19 Be. 58; *Wise* v. *Piper*, 13 Ch. D. 848; 49 L. J. Ch. 611; 41 L. T. 794.

Insertion of "usual powers."

See also Peachey, Settlements, p. 88; the notes to *Lord Glenorchy* v. *Bosville*, Ca. t. Talb. 3, in 1 Wh. & Tud. L. C. Eq.; and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Settled Land Acts, 1882 to 1890.

(*l*) See note (*a*), Prec. XXIII.

(*m*) It is now useless and improper to devise real estates vested in a testator as trustee or mortgagee (including copyholds to which the testator has not been admitted tenant on the court rolls); as the Conveyancing Act, 1881, by sect. 30, makes such estates devolve upon the

44 & 45 Vict. c. 41, s. 30.

**Notes to Prec. 25.**

legal personal representatives, notwithstanding any testamentary disposition, and excludes the heir-at-law from being trustee by constituting the personal representative the "heir" or "assign" within the meaning of all trusts and powers. As regards mortgage estates, it is clearly an improvement in the law to make them devolve upon the executors who have to receive the moneys owing on the security; and in a large majority of cases it was desirable that trust estates should be vested in the same persons as were chosen by the testator to be his own trustees. If, however, it is desired to vest trust estates in other persons, the way to effect this will be to appoint those persons special executors for the purpose. And where a mortgage debt is specifically bequeathed, the legatee should be appointed special executor in respect of the debt, which will vest in him the legal estate in the mortgaged hereditaments.

A devise in fee-simple of "my two houses and stable," by a testator who is mortgagee in possession only, will suffice to pass the mortgage debt secured upon the property in question, where it is the clear intention of the testator to give all the interest he had in the property, *In re Carter*, '00, 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526.

See *In b. Prothero*, L. R. 3 P. & D. 209; 44 L. J. P. 8; 31 L. T. 551, for a case where administration with the will annexed was granted to A. B., limited to the trust property, so far as it was personalty, left to him by the will.

Copyholds.

Trustees frequently, but mortgagees rarely, are admitted to copyholds belonging to them in those capacities: if admitted, sect. 30 of the Conveyancing Act does not apply; see Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, and in this case alone will such a clause as that in this Precedent be proper.

(*n*) See note (*g*), Prec. XII.

## No. XXVI.

WILL *of a* FARMER *disposing of his Personal Property in favour of his Wife and infant Children.—Legacies to Children at Twenty-one or Marriage.—The Wife to be sole Trustee and Executrix during Widowhood; with large discretionary Powers to carry on the Farming Business, and manage the Estate generally.—Wife marrying to have an Annuity; on her death or Marriage the Property is vested in Trustees for the Benefit of the Children.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I GIVE to each child of mine who being a son shall at my death have attained the age of twenty-one years or shall afterwards attain that age or being a daughter shall at my death have attained that age or have been married or shall afterwards attain that age or be married a portion of [£——] to be paid to children being at my death objects of this gift at the end of six calendar months after that event and to children subsequently becoming objects thereof at the end of six calendar months after they shall respectively become such objects but advances (*a*) made by me to any child or children in my lifetime shall according to the amount thereof be taken in full or in part satisfaction of his her or their portion or portions unless I shall otherwise declare by codicil to this my will (*b*) I EMPOWER my wife [*name*] to carry on my farming and grazing business and for that purpose to continue tenant of the farm which I shall use at my death or to hire and use any other farm and employ my live and dead agricultural stock (*c*) and such part of my personal estate as she shall think fit with liberty for her at any time to transfer the business to any son or sons of mine or admit any son or sons of mine to a share thereof and lend to him or them the capital employed or requisite to be employed

Portions to sons at twenty-one, daughters at twenty-one or marriage.

Wife empowered to carry on farm.

**Prec. 26.**

Wife empowered to manage and invest the personal estate at her discretion.

Wife to take the profits and income, bringing up the infant children except married daughters.

Wife marrying again to receive an annuity for her separate use and deliver up the trust property.

Cesser of annuity on alienation.

On wife's death or marriage, the property to vest in other trustees;

therein or any part thereof upon such security and such terms as she shall think reasonable I EMPOWER my wife to manage personal estate generally in such manner as shall appear to her to be most advantageous to my family with liberty at her discretion either to permit it to continue in the state in which it shall be found at my death or to get it in and invest the proceeds in her name upon any stocks funds or securities or at any rate of interest or in the purchase of any real or personal property and to vary the investment when and as she shall think fit but any real property so purchased shall be considered as converted into and treated as personalty for all the purposes of my will I GIVE to my wife all the income of so much of the personal estate to which I shall be entitled at my death as shall be in anywise employed or invested inclusive of the profit of the said business and also the use of the residue thereof but charged with the maintenance education and bringing up in a manner suitable to their station in life of my sons for the time being under the age of twenty-one years and my daughters for the time being under that age not being or having been married And in the event of my wife marrying again I henceforth ANNUL the powers and benefits hereinbefore given to my wife and GIVE to her an annuity of £—— during the remainder of her life payable quarterly into her proper hands and on her personal receipt as a separate and inalienable provision the first payment to accrue due and be made at the end of three calendar months after her marriage if she shall within that time account for and deliver up my personal estate in her hands to the other trustees or trustee for the time being of my will to their or his satisfaction and if not then at the end of three calendar months after such accounting and delivery AND I DECLARE that if my wife shall either before or after such her second marriage do or suffer any act or thing whereby her said annuity of £—— or any part thereof shall be aliened or incumbered the same annuity shall thereupon cease I DECLARE that on the death or marriage of my wife my personal estate shall vest in the other trustees or trustee for the time being of my will who shall have the same power and liberty in regard to my

business as I have given to my wife by the second clause of my will of carrying on the same for such period as the circumstances of my estate or my family shall in the opinion of my said trustees or trustee render it convenient or desirable so to do and subject thereto shall convert or get in my personal estate not invested in authorised trust investments and invest and place out the produce in and upon authorised trust investments but with liberty to continue any investments of a different description which they or he shall think it inexpedient to disturb (*d*) I DECLARE that the said trustees or trustee shall hold my personal estate from and after the death or marriage of my wife IN TRUST for my child if only one wholly or all my children if more than one equally to be absolutely vested in a son at the age of twenty-one years and in a daughter at that age or marriage And as to the share or shares original and accruing of a son or sons dying under that age and of a daughter or daughters dying under that age without having been married IN TRUST for the other or others of my children conformably to the preceding trust With power for the said trustees or trustee to apply the whole or part of the income and any part not exceeding one-half of the capital of each child's original and accruing share not absolutely vested for his or her benefit by way of maintenance advancement or otherwise and the unapplied income of each such share shall be accumulated and the accumulations be deemed an accretion to the same share I APPOINT my wife during widowhood and on her death or if she shall marry again then on her marriage my friends [*names*] to the offices of executor and trustee (*e*) of my will and guardian (*f*) of my infant children I REVOKE all prior wills and codicils IN WITNESS &c.

their powers and duties as to farming, converting, and investing.

Trust property given on death or marriage of wife to children equally;

—accruer;

—maintenance and advancement.

Appointment of widow to be trustee, &c.—substitution on her death or marriage.

**NOTES to Precedent XXVI.**

(*a*) Where a testator, subsequently to the date of his will, advances, on marriage or otherwise, a sum of money to a child to whom he has bequeathed a pecuniary legacy, the advancement will be a satisfaction either wholly or *pro tanto*, as the case may be, *Ex parte Pye*, 18 Ves. 140; 11 R. R. 173; *Rawlins* v. *Powell*, 1 P. W. 299; *Ellison* v. *Cookson*, 3 Br. C. 61; *Thellusson* v. *Woodford*, 4 Mad. 420; *Pym* v. *Lockyer*, 5 M. & C. 29; *Leighton* v. *Leighton*, L. R. 18 Eq. 458; 43 L. T. Ch. 594; *In re*

As to ademption of legacies to children by advancements.

**Notes to Prec. 26.**

Ademption by advancement.

*Furness*, '01, 2 Ch. 346; 70 L. J. Ch. 580; 84 L. T. 680; but not if the legacy is of something different from the advancement, as, where one is of an annuity and the other is of a gross sum, *Holmes* v. *Holmes*, 1 Br. C. 555; 1 R. R. 2; not even where the subject-matter of each is the same, if they are made *diverso intuitu*, *Roome* v. *Roome*, 3 Atk. 181; *Bell* v. *Coleman*, 5 Mad. 24; nor where the advancement is subject to a contingency not affecting the legacy, *Spinks* v. *Robins*, 2 Atk. 491; *Crompton* v. *Sale*, 2 P. W. 553. The rule established in *Holmes* v. *Holmes*, *ubi sup.*, that the presumption against double portions will not prevail where the testamentary portion and the subsequent advancement are not *ejusdem generis*, has been left untouched by modern decisions, *In re Jaques*, '03, 1 Ch. 267; 72 L. J. Ch. 197; 88 L. T. 210. Also the legal presumption that an advancement is an ademption *pro tanto* of a legacy left to a child by will may be rebutted when all the circumstances and the manner of the gift are taken into consideration, *In re Scott*, '03, 1 Ch. 1; 72 L. J. Ch. 20; 87 L. T. 574. But where there was a bequest of a residue (including a business which testator directed to be sold) to his children equally, a subsequent gift in his lifetime of the business to two of the children effected an ademption *pro tanto* of their shares in the residuary bequest, *In re Vickers*, 37 Ch. D. 525; 57 L. J. Ch. 738; 58 L. T. 920. It was held in *Freemantle* v. *Banks*, 5 Ves. 79, that a bequest of a residue or part of a residue (being of uncertain amount) was not adeemed by a subsequent advancement of a portion; but in *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; 29 L. J. Ch. 65; 1 L. T. 251; *Schofield* v. *Heap*, 27 Be. 93; 28 L. J. Ch. 104; *Beckton* v. *Burton*, 27 Be. 99; 28 L. J. Ch. 673, it was decided that a portion is wholly or *pro tanto* a satisfaction or ademption of a prior bequest of an aliquot part of a residue, in the same manner as of a legacy of fixed amount. See also *Dawson* v. *Dawson*, L. R. 4 Eq. 504; *Nevin* v. *Drysdale*, L. R. 4 Eq. 517; 36 L. J. Ch. 662; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; 43 L. J. Ch. 134; but small sums doled out by the testator at different times are not taken into account, *Watson* v. *Watson*, 33 Be. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236. And advances are only brought into account as between the children themselves, not for the benefit of a tenant for life of half the residue, *Meinertzhagen* v. *Walters*, L. R. 7 Ch. 670; 41 L. J. Ch. 801; 27 L. T. 326; see also *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; 44 L. J. Ch. 367; 32 L. T. 545; *In re Heather*, '06, 2 Ch. 230; 75 L. J. Ch. 568; 95 L. T. 352.

The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the will, though without reference to any special application of the money, *In re Pollock*, 28 Ch. D. 552; 54 L. J. Ch. 489; 52 L. T. 718.

Adeemed legacy not revived by codicil.

A legacy which has been adeemed by an advancement is not revived by a codicil subsequent to the advancement, even though the codicil confirms the will and all the bequests therein, *Powys* v. *Mansfield*, 3 M. & C. 376; *Montague* v. *Montague*, 15 Be. 565; 92 R. R. 550. See also *In re Smythies*, '03, 1 Ch. 259; 72 L. J. Ch. 216; 87 L. T. 742.

**Notes to Prec. 26.**

Perhaps it may be stated generally, that where a testator has bequeathed a sum of money for a specific purpose, and has afterwards himself expended the money in effecting such purpose, the legacy is satisfied, see *Husbands* v. *Husbands*, 1 Ver. 95; *Maher* v. *Linigan*, 15 L. T. O. S. 97; *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *In re Corbett*, '03, 2 Ch. 326; 72 L. J. Ch. 775; 88 L. T. 591; but cases of this kind seem to be distinct from the general doctrine of satisfaction before stated, which is applicable exclusively to legacies by parents, or persons standing *in loco parentis*: on which ground bequests by a putative father, *Debeze* v. *Mann*, 2 Br. C. 165; 1 R. R. 57; or by a grandfather in the lifetime of the father, *Roome* v. *Roome*, 3 Atk. 183, have been held not to be satisfied by subsequent advancements; but it would seem, according to the doctrine of *Powys* v. *Mansfield*, 3 M. & C. 359; 45 R. R. 277, that the existence of the father does not preclude its being shown, even by extrinsic evidence, to have been the actual intention of the testator to assume the parental office in regard to the duty of providing for the objects in question.

See further, as to the satisfaction or ademption of a legacy by a portion, the notes to *Ex parte Pye*, 18 Ves. 140; 11 R. R. 173, in 2 Tud. L. C. Eq.

Evidence of advances.

Interest on advances.

(*b*) Subsequent unattested statements in testator's handwriting are admissible as evidence of the amount of the advances, *Whateley* v. *Spooner*, 3 K. & J. 542; see also *Hall* v. *Hill*, 1 Dr. & War. 94; 58 R. R. 223; *Kirk* v. *Eddowes*, 3 Ha. 509; 64 R. R. 390; *Maher* v. *Linigan*, 15 L. T. O. S. 97. In the absence of any direction by the testator, the advances bear no interest up to his death, but the advanced child is charged with interest at 4 per cent. per annum from the testator's death, *Field* v. *Seward*, 5 Ch. D. 538; *Stewart* v. *Stewart*, 15 Ch. D. 539; 49 L. J. Ch. 763; 43 L. T. 370, or from the death of a tenant for life, *In re Rees*, 17 Ch. D. 701; 50 L. J. Ch. 328; 44 L. T. 241. Where a testator had advanced 2,000*l.* at 5 per cent. interest to one of his children, and by his will, after giving all his property on trust for his widow for life, remainder to his children equally, he provided that any advances made by him to any of his children should go in satisfaction of that child's share *pro tanto*, it was held that the advanced child must continue to pay the interest on the 2,000*l.* until he became entitled to be paid his share of the testator's estate, that is, until the death of the tenant for life, *Limpus* v *Arnold*, 15 Q. B. D. 300; 54 L. J. Q. B. 85. In *In re Aird's Estate*, 12 Ch. D. 291; 48 L. J. Ch. 631; 41 L. T. 180, testator by codicil recited that he had advanced a certain sum to a legatee, and directed that sum to be considered as payment on account of the legacy given by his will: it was held, that the sum must be deducted, though a smaller sum had in fact been advanced. See also *Smith* v. *Conder*, 9 Ch. D. 170; 47 L. J. Ch. 878. *In re Aird* was followed by North, J., in *In re Wood*, 32 Ch. D. 517; 55 L. J. Ch. 720; 54 L. T. 932; and he there held, that *In re Aird* had not been overruled by the Court of Appeal in *In re Taylor's Estate*, 22 Ch. D. 495; 48 L. T. 552, but that this last

**Notes to Prec. 26.**

case had been decided merely on the very special words of the will and codicil there in question. See *In re Kelsey*, '05, 2 Ch. 465; 74 L. J. Ch. 701. Where advances were made by the trustees of a will under powers of advancement therein contained, it was held by the Court of Appeal, *In re Dallmeyer*, '96, 1 Ch. 372; 65 L. J. Ch. 201; 73 L. T. 671, that the son advanced should not be debited with interest on the advances made to him in respect of the period prior to the period of distribution. See also *In re Davy*, '08, 1 Ch. 61; 77 L. J. Ch. 67; 97 L. T. 654.

Emblements;

(*c*) As between the heir and executor, emblements belong to the executors; but as between an executor and a devisee, they belong to the devisee, unless they are expressly bequeathed, Co. Litt. 55 b, n. by Harg. & Butl.; Shep. Touch. 472. Under a will in which there was a specific devise to A. of land, and a bequest to B. of "all my personal estate and effects whatsoever and wheresoever not hereinbefore specifically bequeathed," it was held that the emblements passed with the land to A., *Cooper* v. *Weelfit*, 2 H. & N. 122.

—comprise what.

Emblements comprise not only corn crops, but also hops, saffron, flax, and hemp, 4 Burn's Eccl. L. 299; and the law of emblements extends also (it would seem) to artificial grasses, clover, saint-foin, and the like, *Graves* v. *Weld*, 5 B. & Ad. 105; to roots in gardens, as turnips, carrots, potatoes, Co. Litt. 55 b; *Evans* v. *Roberts*, 5 B. & C. 832; 29 R. R. 421; and generally to whatever is produced for annual profit by labour and cultivation. But the law of emblements does not extend to produce beyond that of the current year, see *Graves* v. *Weld*, *ubi sup.*; as to teazles, see *Kingsbury* v. *Collins*, 4 Bing. 202; 5 B. & Ad. 120; 29 R. R. 354; nor to growing crops of grass (even though sown from seed, and ready to be cut for hay); nor to timber or fruit trees, fruit on trees, shrubs or plants, *Empson* v. *Soden*, 4 B. & Ad. 655; except in the case of a gardener or nurseryman by trade, *Penton* v. *Robart*, 2 Ea. 90; *Wyndham* v. *Way*, 4 Tau. 316; 13 R. R. 607; nor generally to anything which is not planted or produced annually at the expense and by the labour of the occupier. See also 1 Wms. Exors. 536 *et seq.*; Amos & Ferrard, Fixtures, 265.

Bequest of farming stock.

A bequest of farming stock will, in general, carry growing crops, *West* v. *Moore*, 8 Ea. 339; 9 R. R. 460; *Cox* v. *Godsalve*, 6 Ea. 604, n.; 8 R. R. 570; but in *Vaisey* v. *Reynolds*, 5 Rus. 12; 29 R. R. 4, Sir John Leach, M.R., considered that this rule was confined to cases in which the legatee of the farming stock was also the residuary legatee of the general personal estate, a distinction which seems not very satisfactory, and was expressly disapproved of in *In re Roose*, 17 Ch. D. 696; 50 L. J. Ch. 197; 43 L. T. 719. See also *Rudge* v. *Winnall*, 12 Be. 357; 85 R. R. 119, where there being a devise to A., and a bequest of all live and dead stock and all personal estate to B., it was held that the emblements on the real estate passed to B. Of course, if the testator is not the owner of the land on which the crops are growing, the question as to emblements being included in a bequest of farming stock can arise only between the legatee of the farming stock on the one hand, and the

residuary legatee or executor on the other hand: in such a case it seems that, irrespective of the distinction taken by Sir J. Leach, the legatee of the farming stock is entitled to the emblements. The severance of the emblements from the land is a necessary consequence of the non-ownership of the farm by the testator.

(*d*) See note (*b*), Prec. IV.

(*e*) See note (*f*), Prec. VI.

(*f*) See note (*g*), Prec. XII.

**Prec. 27.**

## No. XXVII.

WILL *of a* LANDED PROPRIETOR *devising his Real Estate in Settlement, and adopting the provisions of the Settled Land Act,* 1882.—*Bequest of Residuary Personal Estate to be applied for the purposes authorised by that Act.*

I —— of —— in the county of —— esquire hereby revoke all wills codicils and testamentary dispositions heretofore made by me and declare this to be my last will executed this —— day of —— 19— I DEVISE all my real estate to the uses following (namely) To the use that my wife may receive out of the rents thereof during her life a yearly rent-charge of £—— payable quarterly (*a*) AND subject thereto To the use of my sons and daughters and my brothers and sisters and their respective issue in the order for the estates and in manner following (namely) first to my sons and their issue secondly to my daughters and their issue thirdly to my brothers and their issue and lastly to my sisters and their issue (*b*) every elder son daughter brother and sister and his or her issue to be preferred to every younger and his or her issue and every son and daughter of mine and every brother and sister of mine born in my lifetime to be tenant for life and as to my freehold estates without impeachment of waste With remainder to his or her first and other sons successively by seniority in tail male with remainder to his or her daughters successively by seniority in tail male with remainder to his or her sons successively by seniority in tail with remainder to his or her daughters successively by seniority in tail and every brother and sister of mine born after my death to be tenant in tail male with remainder to himself or herself in tail But so that the estate of every female tenant for life shall be hers without power of alienation or anticipation And on failure of such issue to the use of my own right heirs AND I appoint [*names of trustees*] to be the trustees of the settlement hereby

Devise to uses.

Rent-charge to wife.

To testator's lineal and collateral relations in strict settlement.

To testator's right heirs.

**Prec. 27.**

created of my real estate (*c*) I BEQUEATH all my chattels real to the said trustees Upon trust to permit the same to be enjoyed according to the aforesaid limitations of my real estate but so that such chattels real shall be subject to an executory limitation over on the death under the age of twenty-one years of any tenant in tail by purchase of my freehold hereditaments to or in trust for the person or persons entitled under the subsequent limitations according to the tenor thereof I BEQUEATH all the residue of my personal estate to the said trustees Upon trust to convert the same into money and thereout to pay my funeral and testamentary expenses and debts And in the next place to set apart a sum of £—— for the portion of each child of mine (other than an eldest or only child entitled to the freehold or inheritance of my real estate under the limitations hereinbefore contained) who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married under that age And to hold the residue of my personal estate and the moneys representing the same In trust to apply the same for any of the purposes to which the same would be applicable under or by virtue of the Settled Land Act 1882 if the same had arisen from the sale of lands hereby devised and had been paid to the said [*trustees*] as the trustees of the settlement of my real estate hereby created (*d*) I APPOINT the said trustees to be the executors of this my will AND lastly I appoint after the decease or future marriage of my wife the said trustees or the survivor of them to be the guardian or guardians of such of my children as shall be minors at the time of my death (*e*) IN WITNESS &c.

Chattels real.

Residue of personalty.

**NOTES to Precedent XXVII.**

(*a*) See sect. 44 of the Conveyancing Act, 1881, giving the annuitant powers of distress and entry.

(*b*) Compare this form with the longer one in Prec. XXVIII.

(*c*) See the Settled Land Act, 1882, in reliance upon which all powers usually heretofore inserted in wills devising real estate in settlement have been omitted from this Precedent. Any attempt to prohibit a tenant for life from exercising his statutory powers is void (sect. 51).

(*d*) See sect. 21 of the Act.

(*e*) See note (*g*), Prec. XII.

**Prec. 28.**

## No. XXVIII.

WILL *of a large* LANDED PROPRIETOR.—*Charge of Annuities.—Additional Jointure Rent-charge for Wife.—Term for raising Money in aid of Personal Estate to pay Debts and Legacies.—Term for raising Portions for Testator's younger Children.—Limitations in strict Settlement to the Testator's Issue, with Remainders to his collateral Relations.—Powers to Tenants for Life to charge with Jointures; to limit Life Estates to Husbands; to charge with Portions for younger Children.—Appointment of Trustees to manage and for purposes of Settled Land Acts during minorities.—Clause enjoining the Use of Testator's Name and Arms.—Devise of Copyhold and Leasehold Estates upon corresponding Trusts. Plate, &c., to be enjoyed as Heirlooms.—Bequest of Carriages, &c., to Wife.—Direction to keep up Testator's Establishment for a short Period.—Bequest of the Residue of Personal Estate to Trustees for Investment in Land, to be settled to the Uses of the devised Estate.—Provisions for changing Trustees.—Appointment of Executors and Guardians.—One of the Trustees, a Solicitor, to be entitled to professional Charges.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name &c.*] I GIVE to the several persons next hereinafter named for their respective lives yearly sums of the respective amounts next hereinafter specified (that is to say) To [*annuitant's name &c.*] £—— To —— &c. which yearly sums shall issue as rent-charge out of all my freehold lands in the parish of —— and be payable half-yearly on the 24th day of June and the 25th day of December the first payment to be made [*or* a proportionate part for so much of the current half-year as shall be unexpired at my death to be paid] on

Gift of life annuities, charged on particular lands.

**Prec. 28.**

such of the same days as shall happen next after my death I DISPOSE of all the freehold hereditaments of which I am or may at my death be competent to dispose (including my reversion in fee in the freehold estate at —— comprised in my marriage settlement but as to my said lands at —— aforesaid hereinbefore charged with the payment of the said annuities subject to such charge) in manner following (namely) As to my hereditaments at —— at the date of this my will let to [*name of tenant*] at the yearly rent of £—— To [*first set of trustees*] their executors administrators and assigns for the term of five hundred years to be computed from my death without impeachment of waste upon the trusts hereinafter expressed. And as to the same hereditaments subject to such term and as to all other the hereditaments aforesaid To the intent (*a*) that my wife [*name*] may receive out of the rents during her life a yearly rent-charge of £—— in addition to the jointure provided for her by my said marriage settlement by equal quarterly payments at Lady-day Midsummer Michaelmas and Christmas but without any proportional part thereof down to her death the first quarterly portion to be payable on such of the same days as shall first happen after my death (*b*) And subject to the same rent-charge To [*second set of trustees*] their executors administrators and assigns for the term of one thousand years to be computed from my death without impeachment of waste upon the trusts hereinafter expressed AND subject to such term I DEVISE all the hereditaments aforesaid To every son of mine and his issue male in succession so that every elder son and his issue male may be preferred to every younger son and his issue male and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male. And on failure of such issue To every daughter of mine and her issue male in succession so that every elder daughter and her issue male may be preferred to every younger daughter and her issue male and so that every such daughter may take an estate for her life without power of anticipation with remainder to her first and every subsequent son successively according

Devise of freehold estates;

—as to part to trustees for 500 years;

—as to all the estates; to testator's wife a rent-charge for life, in addition to her jointure.

To trustees for 1,000 years;

—to testator's sons for life, remainder to their first and other sons in tail male;

—to testator's daughters for life, remainder to their first and other sons in tail male;

**Prec. 28.**

—to first and other daughters of testator's sons and daughters in tail male;

—to first and other sons and daughters of testator's sons and daughters in tail;

—to testator's brothers born in his lifetime, for life, with like remainders to their issue;

—to testator's brothers born after his death, in tail male and tail;

—to testator's sisters and their issue in like manner;

[*Or*—to a brother, for life; remainder to his children born in testator's lifetime, for life: remainder to their issue;

—to children of brother born after testator's death, in tail male, and in tail;

to seniority in tail male And on failure of such issue To the first and every subsequent daughter successively in tail male of every son and daughter of mine in the order in which my said hereditaments are hereinbefore limited to the sons of every son and daughter of mine And on failure of such issue To the first and every subsequent son and the first and every subsequent daughter successively in tail of every son and daughter of mine in the order in which my said hereditaments are hereinbefore limited in tail male to the sons and daughters of every son and daughter of mine And on failure of such issue To every brother of mine born in my lifetime and his issue for the same estates and in the same order as my said hereditaments are hereinbefore limited to every son of mine and his issue And on failure of such issue To every brother of mine born after my death and his issue for the same estates and in the said order as my said hereditaments are hereinbefore limited to the first and every subsequent son of every son of mine And on failure of such issue To every sister of mine born in my lifetime and her issue for the same estates and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited to every daughter of mine and her issue And on failure of such issue To every sister of mine born after my death and her issue for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent daughter of every son of mine [*or* To my brother [*name*] for his life and after his death to every son and daughter born in my lifetime of my said brother and the issue of such son and daughter for the same estates and in the same order and as to daughters subject to the same limitations as my said hereditaments are hereinbefore limited to every son and daughter of mine and his or her issue And on failure of such issue To every son and daughter born after my death of my said brother and the issue of such son and daughter for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son and the first and every subsequent daughter of every son and daughter of mine And on failure of such issue To THE USE of my brother [*name*] and his issue

**Prec. 28.**

for the same estates and in the same order as my said hereditaments are hereinbefore limited to my said brother [*name*] and his issue And on failure of such issue To my sister [*name*] the wife of [*name &c.*] and her issue for the same estates and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited to every daughter of mine and her issue And on failure of such issue To THE USE of my sister [*name*] and her issue for the same estates and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited to my said sister [*name*] and her issue] And on failure of such issue To my own right heirs AND I DECLARE every estate for life hereinbefore limited to be unimpeachable for waste I DECLARE that the said term of five hundred years hereinbefore limited to the said [*first set of trustees*] is so limited UPON TRUST in case my personal estate not hereinafter bequeathed to my wife shall be insufficient to satisfy my debts funeral and testamentary expenses and the pecuniary legacies hereinafter bequeathed then out of the rents and profits of the hereditaments comprised in the same term or by mortgage or sale of the same premises or any part thereof or by any other means to raise in aid of my personal estate not so bequeathed so much money as shall be sufficient to satisfy the same debts expenses and legacies and to pay such money to my executors or administrator who shall apply the same accordingly and whose receipt shall exonerate the trustees or trustee of the said term of five hundred years from all liability in respect of the application thereof AND I DECLARE that the said term of one thousand years hereinbefore limited to the said [*second set of trustees*] is so limited to them UPON TRUST in case any child or children of mine other than an eldest or only child entitled to the freehold or inheritance of the said hereditaments under the limitations hereinbefore contained shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or being married then to raise for the portion or portions of such child or children if only one the sum of £—— or if two and no more the sum of £—— to be divided equally between them or if three or more the sum of £——

—to another brother and his issue, in like manner;

—to a sister and her issue, in like manner;

—to another sister and her issue, in like manner.]

—to testator's right heirs.

Trusts of 500 years term, for raising money in aid of personal estate, to pay debts and legacies.

Trusts of 1,000 years term, for raising portions for younger children.

**Prec. 28.**

to be divided equally amongst them in addition to the provision made for the said children by my said marriage settlement the portion of a son to be raiseable when and as he shall attain the said age and the portion of a daughter to be raiseable when and as she shall attain that age or be married with interest after the rate of four per cent. per annum on the said portion or portions from the period or respective periods at which the same ought to be raised until the same shall be actually raised and paid I EMPOWER every male tenant for life under the limitations herein contained whether entitled in possession or not and either in contemplation of or after marriage by deed revocable or irrevocable or by his will to appoint (but without prejudice to any prior subsisting uses or powers) to or in favour of any woman whom he shall marry or have married a yearly rent-charge or rent-charges not exceeding in the whole the sum of £—— to be issuing out of my said hereditaments or any part thereof and to commence from the death of such tenant for life and to be payable half-yearly during the life of such woman for her jointure But no rent-charge to be appointed under this power shall take effect as an actual charge unless the appointor shall be or afterwards become entitled in possession to the said hereditaments or would if living have been so entitled under the limitations herein contained And if the said hereditaments would under this power be liable at any one time to the payment of a larger yearly sum in the whole than £—— then the posterior charge or charges shall not take effect or shall only partially take effect in possession until the amount of the previous charge shall cease or be diminished so as always to limit the existing annual charge to the sum lastly specified I EMPOWER every female tenant for life under the limitations herein contained whether entitled in possession or not either in contemplation of or after marriage by deed revocable or irrevocable or by her will to appoint (but without prejudice to any prior subsisting uses or powers) to or in favour of any husband to whom she shall be or have been married my said hereditaments or any part thereof for his life or any yearly rent-charge to be issuing out of my said hereditaments or any part thereof and to be

Power to male tenants for life to limit jointures to wives.

Power to female tenants for life to limit life estates or rent-charges to husbands.

payable during his life such appointed estate or yearly rent-charge to commence from the death of the appointor But no estate or yearly rent-charge to be appointed under this power shall take effect as an actual estate or charge unless the appointor shall be or afterwards become entitled in possession to the said hereditaments or would if living have been so entitled under the limitations herein contained I EMPOWER every tenant for life under the limitations herein contained whether entitled in possession or not by deed revocable or irrevocable or by will to appoint (but without prejudice to any jointure rent-charge or life estate to be limited to the wife or husband of such tenant for life under any power hereinbefore contained) my said hereditaments or any part thereof to any trustee or trustees for any term of years without impeachment of waste upon proper trusts and with proper powers and provisions for raising otherwise than by sale for the child or children of the tenant for life so appointing other than an eldest or only (*c*) child entitled to the inheritance of the said hereditaments under the limitations aforesaid a portion not exceeding £—— for one child or portions not exceeding in the whole £—— for two children or £—— for three or more children (*d*) with maintenance not exceeding interest at the rate of four per cent. per annum on such portion or portions But the trusts of the term to be created as last aforesaid shall not be capable of being executed unless the appointor or some of his or her issue shall be or shall afterwards become entitled in possession to the said hereditaments under the limitations aforesaid And if the said hereditaments would by reason of the exercise of this power be liable at any one time to the payment of a larger principal sum in the whole than £—— (including the portion or portions raiseable under the trusts of the said term of one thousand years) then the charge or charges posterior in point of title shall be wholly or partially suspended I APPOINT [*third set of trustees*] or the survivor of them his executors or administrators during the minority of any tenant for life or tenant in tail by purchase (*e*) entitled under the limitations hereinbefore contained to the present possession of or receipt of the income from all or any part of

Power to tenants for life to charge with portions for younger children.

Appointment of trustees to manage and for purposes of Settled Land Acts during

**Prec. 28.**

minorities of life tenants.

the said freehold hereditaments hereinbefore devised to be trustees or trustee for the purpose of managing the said freehold hereditaments and also the copyhold and leasehold hereditaments hereinafter devised and bequeathed to them and of applying the income thereof during such minority and also for the purpose during such minority of exercising any of the powers of a tenant for life under the Settled Land Acts in respect of the said hereditaments I DECLARE that

Proviso requiring persons entitled under the limitations to take the testator's name and arms.

every person having a surname or arms different from the surname or arms hereinafter required to be used who shall be entitled in possession as beneficial tenant for life or tenant in tail by purchase under the limitations herein contained and not be a married woman or who shall marry any female becoming so entitled shall as to every such tenant within eighteen calendar months after he or she shall become entitled in possession if of the age of twenty-one years or if not within eighteen calendar months after attaining that age and as to every such husband within eighteen calendar months after his wife shall become entitled in possession or be married to him whichever shall last happen assume and use under the sanction of an Act of Parliament or licence from the Crown or otherwise my surname of —— either alone or in addition to his or her usual surname (but so that the name of —— shall be the last and principal name) also the arms of —— quartered with his or her family arms and shall thenceforth use the same surname and arms accordingly and that every person excluded by reason of his or her already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms And that in case of neglect or refusal (*f*) to comply with all or any of the requisitions of this proviso the estate or estates hereby limited for the life of the person or as the case may be the estate tail hereby limited to the person or ancestor of the person who or whose husband shall be guilty of such neglect or refusal shall cease as though such person neglecting or refusing were dead and the subsequent limitations be accelerated AND I DECLARE that on the cesser of the estate of a female tenant for life whose husband shall so neglect or refuse as aforesaid

**Prec. 28.**

any appointment or appointments of a life estate or rent-charge made or to be made by her in his favour in exercise of the power hereinbefore given to her shall be void I DEVISE the copyhold tenements and hereditaments to which I may be entitled at my death to such of the uses and subject to such of the provisions hereinbefore contained concerning my freehold hereditaments hereinbefore devised as are posterior to the limitation of the said term of five hundred years except the clause declaring life estates to be unimpeachable for waste [*Or*, I DEVISE my copyhold tenements and hereditaments To THE USE of the said (*third set of trustees*) in fee simple upon such trusts and subject to such provisions as shall correspond as nearly as the difference of tenure will permit with the uses and provisions hereinbefore contained concerning my freehold hereditaments hereinbefore devised posterior to the limitation of the said term of five hundred years] I DEVISE AND BEQUEATH the leasehold tenements to which I may be entitled at my death whether held for lives or for years absolute or determinable unto the said [*third set of trustees*] their executors and administrators UPON TRUST to permit the same tenements to be enjoyed as nearly as the difference of tenure will allow according to the limitations and provisions hereinbefore contained concerning my freehold estates hereinbefore devised posterior to the limitation of the said term of five hundred years but so that my leasehold tenements held for years shall be subject to an executory limitation over on the death of any tenant in tail by purchase of my freehold hereditaments under the age of twenty-one years to or in favour of the person or persons entitled under the subsequent limitations according to the tenor of such limitations (*g*) I DECLARE that the rents of my real and leasehold estates and tenements current or accruing at the time of my death shall not be apportioned (*h*) I DIRECT that the library of books with the book cases and appendages the pictures and framed prints and the statues marbles bronzes and other articles of *vertu* which shall be in or about or belonging to my mansion-house of —— at my death and all my plate and jewels there and elsewhere shall be annexed to the same mansion-house as heirlooms to be enjoyed by the

Devise of copyhold estates by reference to the limitations of the freehold estates.

[Another form.]

Devise of leasehold estates for lives and years to trustees, to be enjoyed according to the limitations of the freeholds.

Plate, pictures, &c., to be enjoyed as heirlooms, and an inventory taken.

**Prec. 28.**

person or persons for the time being beneficially entitled to the same mansion-house under the limitations hereinbefore contained but so that such heirlooms shall be subject to an executory limitation over on the death of each tenant in tail by purchase under the age of twenty-one years to or in favour of the person or persons entitled under the subsequent limitations according to the tenor of such limitations AND I DIRECT that my executors shall within one calendar month after my death cause an inventory to be made of the said heirlooms and place a copy of such inventory signed by them and by the person then entitled to the enjoyment of the said heirlooms among the muniments of title to my said mansion-house to be kept therein and shall deliver another copy so signed to the said [*third set of trustees*] or the survivor of them his executors or administrators to be kept by them or him I DECLARE that it shall be lawful for the said [*third set of trustees*] or the survivor of them his executors or administrators with the consent in writing of the person or persons for the time being beneficially entitled to the same mansion-house as aforesaid to exchange for others or absolutely to sell and dispose of all or any of the said heirlooms (*i*) and to employ the moneys to arise from any such sale or sales in the purchase (with the like consent) of any new or other article or articles of a similar nature and description to be subject together with those taken in exchange to the same directions as are herein expressed concerning the said heirlooms I DECLARE that my wife shall be at liberty to reside in my mansion-house of —— for six calendar months after my death and that whether she shall reside therein or not my executors shall keep up my establishment there for that period upon the same scale and in the same mode as it had been usually maintained in my lifetime and defray the housekeeping expenses servants' wages taxes and all other incidental outgoings out of my personal estate I BEQUEATH my carriages carriage and saddle horses with the harness and accoutrements belonging thereto wines liquors fuel housekeeping stores and provisions (*k*) household furniture (*l*) linen china brewing utensils and other household effects belonging to me at my death (except the articles hereinbefore constituted

Power to sell and exchange heirlooms.

Permission to wife to reside in mansion-house for six months; executors to keep up the establishment.

Bequest to wife of carriages, &c.

**Prec. 28.**

heirlooms) to my wife absolutely but subject to be used and consumed by my executors in keeping up my establishment as aforesaid I BEQUEATH the residue of the personal estate to which I may be entitled at my death unto the said [*third set of trustees*] their executors and administrators UPON TRUST to convert collect and get in the same and as to the moneys to arise therefrom UPON TRUST to lay out the same in the purchase of freehold hereditaments in fee simple in possession (*m*) situate in England or Wales or of copyhold or customary or leasehold tenements (such leasehold tenements to be held under a renewable lease or leases for lives or for years or for a term of years absolutely whereof at least fifty years shall be unexpired) convenient to be held with the hereditaments hereinbefore limited in strict settlement and UPON TRUST to settle or cause to be settled the hereditaments and tenements so to be purchased to and upon such of the uses and trusts and subject to such of the provisions hereinbefore limited or expressed concerning my freehold hereditaments hereinbefore devised as shall be subsisting but so that the chattels real to be so settled shall be subject to an executory limitation over on the death of any tenant in tail by purchase of the said freehold hereditaments under the age of twenty-one years to or in favour of the person or persons entitled under the subsequent limitations of the same freehold hereditaments according to the tenor of such limitations I AUTHORISE the trustees or trustee for the time being of such residue to permit the same or any part thereof to remain outstanding upon securities or otherwise for such period as they or he shall think fit I DECLARE that the yearly produce of my residuary personal estate for the time being outstanding (whether such produce be more or less than such estate if invested pursuant to the trust aforesaid would have yielded) shall be deemed the income thereof and be applied as such conformably to the destination of the rents of the estates directed to be purchased as aforesaid I DECLARE that if the contract which I have entered into dated the —— day of —— instant for the purchase of a freehold estate in the parish of —— in the county of —— shall not be completed in my lifetime

Residue of personal estate to be invested on freehold or leasehold property to be held on same trusts as estates hereinbefore devised.

Power to postpone the conversion of personalty.

Power for trustees to complete a contract without

**Prec. 28.**

requiring a marketable title;

—if contract be abandoned, the money to be laid out in another purchase.

Power of appointing new trustees.

Appointment of executors and guardians.

the said [*third set of trustees*] or the survivor of them his executors or administrators shall have power to carry the same into effect if they or he shall deem it expedient to do so although the title to the said estate shall not be strictly marketable [AND in case the said contract shall be vacated on account of a defect of title or otherwise then I DIRECT my same trustees or trustee to invest a sum of money equal to the amount of the purchase-money in the purchase of freehold lands to be settled to the uses and upon the trusts by this my will declared concerning my real estate and until such purchase shall be made the said moneys or such part thereof as shall not be so laid out shall be invested by my same trustees or trustee in Government or real securities (but not in any other kind of security) and the dividends or interest of such investment shall be paid to the persons who would be entitled to the rents and profits of the land to be so purchased (*n*) PROVIDED ALWAYS that in case any of the said trustees of this my will shall die in my lifetime or shall refuse the trusts or in case any trustee for the time being shall die or become unable or unfit to act or desire to retire from the office then I EMPOWER the surviving or continuing trustees or trustee of the same class or set of trustees or if there shall be none such then the refusing or retiring trustees or trustee if willing to act in the execution of this power or if also none such then the executors or executor administrators or administrator for the time being of the deceased trustee or if there shall be more than one such trustee then the executors or executor administrators or administrator for the time being of the last surviving of such deceased trustees by deed to appoint any person or persons in the room of such deceased refusing incompetent unfit or retiring trustee or trustees and every trustee appointed as aforesaid or by a court of competent jurisdiction shall be competent to exercise all the powers and discretions which are reposed in the trustees of the same class or set hereby named (*o*) I APPOINT the said [*first set of trustees*] to be executors of this my will and I also appoint them and my wife to be guardians of the persons and fortunes of such of my children as at the time of my decease shall be under the age of twenty-one years (*p*)

Prec. 28.

AND it being my desire that the said [*name*] who is my solicitor shall continue to act as such in all matters relating to my property and affairs and shall make the usual professional charges I DIRECT that he shall notwithstanding his acceptance of the office of trustee and executor of my will and his acting in the execution thereof be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him and all attendances time and trouble given or bestowed by him in or about the execution of the trusts and powers of my will or the management and administration of my trust estate real or personal as if he not being himself a trustee or executor of my will were employed by the trustees and executors thereof as their solicitor and he shall be entitled to retain out of my trust moneys or to be allowed and to receive from his co-trustees (if any) out of the same moneys the full amount of such charges any rule of equity to the contrary notwithstanding (*q*) nevertheless without prejudice to the right or competency of the said [*name*] to exercise the authority control judgment and discretion of a trustee of my will LASTLY I REVOKE all former wills and declare this only to be my last will and testament IN WITNESS &c.

Direction that one of the trustees and executors shall act and charge as solicitor to the estate.

**NOTES to Precedent XXVIII.**

(*a*) That the words "to the intent," will create a *legal* rent-charge, see 27 Hen. 8, c. 10, ss. 4, 5.

(*b*) The remedy by distress and entry for recovery of a rent-charge is now supplied by the Conveyancing Act, 1881, s. 44; together with power to create a term of years, as a further remedy, if required.

(*c*) See *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

(*d*) A power to trustees to raise by mortgage a specific sum for portions implies power to raise the costs of the mortgage, *Armstrong* v. *Armstrong*, L. R. 18 Eq. 541; 43 L. J. Ch. 719.

(*e*) As to management of land during minority, see the Conveyancing Act, 1881, s. 42. As to raising money for repairs by means of a mortgage, see *In re Jackson*, 21 Ch. D. 786.

C. A. 1881, s. 42.

(*f*) The points chiefly to be attended to in framing clauses of this nature are: *First*, to describe with explicitness and precision the act or event contemplated by the testator. For instance (by way of selecting a few examples of frequent occurrence), where a name is to be assumed, it should be shown whether the authority of the royal licence or an Act of

Suggestions as to framing clauses enjoining the use of a name and arms, &c.

**Notes to Prec. 28.**

Parliament is to be obtained, or the clause will be satisfied by an assumption of the name without any such sanction, Co. Litt, 3 a; *Davies* v. *Lowndes*, 5 Bing. N. C. 161; *Leigh* v. *Leigh*, 15 Ves. 92; 10 R. R. 31; and whether a person who has previously so assumed it, is to be considered as exempt from an injunction which was imposed exclusively on persons not bearing the name, *Doe* v. *Yates*, 5 B. & Al. 544; 24 R. R. 468; *Hawkins* v. *Luscombe*, 2 Sw. 375; see also *Woodhouse* v. *Herrick*, 1 K. & J. 352; 24 L. J. Ch. 649; 103 R. R. 119; *Langdale* v. *Briggs*, 3 S. & G. 255; 4 W. R. 703; 107 R. R. 76; *Blagrove* v. *Bradshaw*, 4 Drew. 230; *Re Catt's Trusts*, 2 H. & M. 46; *In re Cornwallis*, 32 Ch. D. 388; 55 L. J. Ch. 716; 54 L. T. 844; *In re Brooke*, 54 L. J. Ch. 102. See *Musgrave* v. *Brooke*, 26 Ch. D. 792, as to a name and arms clause intended to defeat a devise in fee simple being void for repugnancy. Where a testator prescribes the mode by which the name is to be assumed, of course no other mode may be substituted for it; but a royal licence or an Act of Parliament is not necessary for adopting a new surname; a voluntary assumption, if made for no fraudulent purpose, is sufficient, *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430; 38 L. J. P. C. 35; and in the absence of any express stipulation or requirement by the testator, it is apprehended that a person voluntarily assuming the name within a reasonable time satisfies the condition imposed on him, and that the words "bearing the surname" are satisfied by a *de facto* bearing of that name. But the assumed surname must follow, not precede, the original name, *D'Eyncourt* v. *Gregory*, 1 Ch. D. 441; 45 L. J. Ch. 205; see also, on clauses of this kind, Peachey on Settlements, 964; as to a woman's surname acquired by marriage, *Fendall* v. *Goldsmid*, 2 P. D. 263; 46 L. J. P. 70; and as to the custody of a deed of grant of arms from the Herald's College, see *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J. Ex. 510. If a will requires that a person shall assume a certain surname within a specified time, a continued use of the surname after the period is to be implied, *In re Drax*, 75 L. J. Ch. 317; 94 L. T. 611.

Name and arms clauses.

Clause enjoining residence.

*Secondly.* If a clause enjoins residence, it ought to appear what length of continuous or occasional occupation is to be deemed sufficient. As to what will constitute residence, see *Fillingham* v. *Bromley*, T. & R. 536; 24 R. R. 136; *Dunne* v. *Dunne*, 7 D. M. & G. 207; *Walcot* v. *Botfield*, Kay, 534; 101 R. R. 719; *Wynne* v. *Fletcher*, 24 Be. 430; *In re Moir*, 25 Ch. D. 605; 53 L. J. Ch. 474; 50 L. T. 10; *In re Wright*, '07, 1 Ch. 231; 76 L. J. Ch. 89; 95 L. T. 697. Notwithstanding sect. 51 of the Settled Land Act, 1882, such clauses would still seem to be valid, *In re Haynes*, 37 Ch. D. 306; 57 L. J. Ch. 519; 58 L. T. 14; but they are void as regards preventing the tenant for life from exercising the powers of a tenant for life under the Settled Land Act, 1882, and after sale he will still be tenant for life of the proceeds of sale, although residence has become impossible, *In re Paget's Settled Estates*, 30 Ch. D. 161; 55 L. J. Ch. 42; 53 L. T. 90. If the object is to confine the appropriation of the property to the personal enjoyment of the devisee,

the clause should be expressly extended to alienations by operation of law.

Conditions of a recurring nature.

*Thirdly.* In cases where the act or event is of a recurring nature, and with reference to a series of limitations, and it is the intention of the framer of the instrument to subject the estate of every person taking under the limitations to the performance of the act or the happening of the event, such intention should be made clear by express provision, lest it should be contended that, by the act having been once performed or the event having once happened, the persons taking under the later limitations are exempt from the consequences incident to the recurrence of the event or to the non-performance by them of the act. In the *Earl of Scarborough's Case* it was contended (though unsuccessfully) that the descent of the earldom and the shifting of the estate having once happened, the use for again shifting the estate on a second descent was nugatory, its power having been exhausted by one operation; much use was made of an argument derived from the different modes in which the clause imposing the necessity of taking the name and arms of the Savile family, and the clause shifting the estate on the descent of the earldom, were framed; the former having been framed so as clearly to enjoin the necessity of complying with the clause *toties quoties*, the latter expressing that necessity with less clearness, *Earl of Scarborough* v. *Savile*, 3 A. & E. 897. In *In re Robinson*, '92, 1 Ch. 95; 61 L. J. Ch. 17; 66 L. T. 81, where the condition was a continuing one, and the fund, the subject of the bequest, being in Court, it was held that it must be retained in Court, and the income paid out to the legatee if he should comply with the condition.

Conditions precedent or subsequent.

*Fourthly.* It should be shown distinctly whether the prescribed act or event is to be in the nature of a condition precedent or a condition subsequent; in other words, whether the performance or happening is to precede the vesting, or the non-performance or non-happening is to devest an interest antecedently vested; whether, in fact, the condition is imposed on the acquisition of the property, or only on its retention. See instances of conditions precedent and subsequent collected in Jarm. Wills, Ch. XXVII.

Time allowed for performance of condition.

*Fifthly.* It should be stated whether the whole duration of life, or any and what less period, is to be allowed for performance, *In re Hartley*, 34 Ch. D. 742; 56 L. J. Ch. 564; 56 L. T. 565; and whether any and what notice is to be given to the devisee. The rule as to notice is, that, where the devisee on whom the condition is imposed is the testator's heir, the devisee over is bound to apprise him of the condition, but not otherwise, *Doe* v. *Beauclerk*, 11 Ea. 657, 662; 11 R. R. 307.

Destination of property, if no compliance.

*Sixthly.* The clause should point out the precise destination of the property in the event of non-compliance, showing clearly, if there are remainders limited to the issue of the offending party, whether they are or are not to be involved in the forfeiture.

Compliance impossible.

*Seventhly.* If the clause is of a nature to require the concurrence of a third person, as, for instance, marrying with consent, &c., or living in

**Notes to Prec. 28.**

the service of another, &c., then it ought to be shown what is to be the result of compliance becoming impracticable by the death or lunacy of such third person. See *ante*, p. 393.

Ignorance of condition.

Ignorance of a condition annexed either to a devise, *Astley* v. *Earl of Essex*, L. R. 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; or bequest, *Re Hodge's Legacy*, L. R. 16 Eq. 92; 42 L. J. Ch. 452; 28 L. T. 624; *Powell* v. *Rawle*, L. R. 18 Eq. 243, does not protect the devisee or legatee from the consequence of non-compliance.

Infancy.

As to infancy excusing devisee from compliance with condition requiring residence, see *Partridge* v. *Partridge*, '94, 1 Ch. 351; 63 L. J. Ch. 122; 70 L. T. 261.

Conditions.

No precise form of expression is required to attach conditions to the enjoyment of gifts conferred by will: any words which show the intention of the testator are sufficient for the purpose. But the intention must be clear, otherwise the condition will be void for uncertainty, *Jeffreys* v. *Jeffreys*, 84 L. T. 417.

And it must not be contrary to public policy. Thus, a condition subsequent in a will divesting property in the event of the beneficiary entering the naval or military service of the country is against the welfare of the community and absolutely void, *In re Beard*, '08, 1 Ch. 383; 77 L. J. Ch. 265; 98 L. T. 315.

Impossibility of condition attached to realty,

As regards real estate, when a condition precedent cannot be fulfilled, owing to its actual impossibility or its illegality, the estate fails; but if a condition subsequent becomes impossible or is illegal, the estate is absolute. See *In re Emson*, 74 L. J. Ch. 565; 93 L. T. 104. But see Jarm. Wills, 850, as to the case where there is a gift over on non-performance of the condition. In *In re Kirk*, 21 Ch. D. 431; 47 L. T. 36, there was a devise on condition that the devisee should relinquish a debt due to him by the testator, and the devisee died before the testator: it was held that the condition bound the land, notwithstanding the lapse, and that the debt must be discharged out of it.

—and personalty.

As regards personal estate, no distinction is recognised between a precedent and subsequent condition. Where a condition attached to a legacy is impossible, the general rule is that the gift vests absolutely and unconditionally; subject, however, to exceptions in the cases, (1) where the fulfilment of the condition is the sole motive of the gift, (2) where the impossibility was not known to the testator when he imposed the condition, and (3) where the condition, originally possible, has become impossible by the act of God. If the condition is void by reason of its involving a *malum prohibitum*, the bequest is absolute; but if the condition involves a *malum in se*, the gift itself is void. In *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604; 40 L. J. Ch. 242; 24 L. T. 314, a condition which would have required the legatee to omit doing something that was a duty was held void; and in *Yates* v. *University College, London*, 7 H. L. 438; 45 L. J. Ch. 137, where a condition became impossible by the act of the testator, it was held that the bequest took effect absolutely.

**Notes to Prec. 28.**

Contingent gift subject to condition.

Repugnant conditions.

That a contingent gift has a real existence, and is capable of being operated upon by a condition subsequent, and of being made to cease and become void, see *Egerton* v. *Brownlow*, 4 H. L. C. 1; 23 L. J. Ch. 348; 94 R. R. 1.

Conditions or restraints inconsistent with and repugnant to estates or interests to which they are annexed are absolutely void. Thus, if there is a devise in fee, a condition that the devisee shall not sell the estate is repugnant to the absolute devise, and therefore void, Co. Litt. sect. 360; but if the condition is that the devisee shall not alien to such an one, or to any of his heirs, or the like, which condition does not take away all power of alienation from the devisee, such condition is good, Co. Litt. sect. 361. But any condition which will amount to an absolute restraint on alienation in such a case will be void. Thus if there is a devise in fee with a condition that the devisee desiring to sell in the lifetime of the testator's widow shall sell the estate to her at a fifth of its real value, this amounts to an absolute restraint on alienation during the widow's life, and is void, *In re Rosher*, 26 Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785, where the cases were reviewed. In *In re Elliot*, '96, 2 Ch. 353; 65 L. J. Ch. 753; 75 L. T. 138, a testator gave certain property to A. absolutely, subject to the payment of his debts, but the will contained a clause to the effect that if at any time A. should sell the property he was to pay certain legacies out of the proceeds of the sale. *Held*, that this clause was repugnant and void, and that A. took the property free from any claim by the legatees of the sums so attempted to be made payable. But a condition annexed to a devise that the property should go over if the devisee ceased to carry on business was held not repugnant in *Re Sax*, 62 L. J. Ch. 688; 68 L. T. 849. Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant, and consequently void, *Barton* v. *Barton*, 3 K. & J. 512; *Holmes* v. *Godson*, 8 D. M. & G. 152; 20 Be. 193; 25 L. J. Ch. 317; *Gulliver* v. *Vaux*, 8 D. M. & G. 167; see *Bradley* v. *Piexto*, 3 Ves. 324; 4 R. R. 7, and the notes thereto in Tud. L. C. R. P.; also *Re Wilcock's Settlement*, 1 Ch. 229; *Shaw* v. *Ford*, 7 Ch. D. 669; 47 L. J. Ch. 531; 37 L. T. 749; *In re Parry and Daggs*, 31 Ch. D. 130; 55 L. J. Ch. 237; 54 L. T. 229; *In re Dugdale*, 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; *In re Dixon*, '03, 2 Ch. 458; 72 L. J. Ch. 642; 88 L. T. 862. Where the absolute interest in personal estate is given, there can be no further gift of it, *Hoare* v. *Byng*, 10 C. & F. 508. Thus a gift of 10,000*l.* to A., and "afterwards, to go to" B., is an absolute gift to A., and the superadded words of gift to B. are rejected as void, *In re Percy*, 24 Ch. D. 616; 49 L. T. 554. But see *In re Sanford*, '01, 1 Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456. In *Brown* v. *Burdett*, 21 Ch. D. 667; 52 L. J. Ch. 52; 47 L. T. 94, where a testatrix devised a house to trustees, upon trust to block it up for twenty years, it was held that there was an intestacy as to the twenty years' term. *In re Johnston*, '94, 3 Ch. 204; 63 L. J. Ch. 753; 71 L. T. 392, affords a good example of an unsuccessful attempt to impose a fetter upon

**Notes to Prec. 28.**

absolute interests in personalty. In that case a testator directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit. *Held*, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.

As to conditions imposed on tenants in tail.

In various points of view it is important that conditions precedent and subsequent should be accurately distinguished. In regard to estates tail, the efficiency of the restriction depends entirely on the distinction; for if it is subsequent, the devisee may, at any time before the actual devesting of the estate, defeat the limitation over by an enrolled conveyance, which would have the effect of destroying all executory limitations ulterior to and engrafted on the estate tail, *Robinson* v. *Comyns*, Ca. t. Talb. 165; *Gulliver* v. *Ashby*, 4 Bur. 1930; *Doe* v. *Beauclerk*, 11 Ea. 657; 11 R. R. 307; *Monypenny* v. *Dering*, 2 D. M. & G. 145; 22 L. J. Ch. 313; 95 R. R. 52. An estate tail, therefore, to which a conditional limitation is intended to be annexed, ought, when possible, to be so framed that it shall not vest in the devisee until performance; and if it is meant that the devisee in tail shall have the enjoyment of the lands antecedently to the performance of the condition, a precedent estate for years should be carved out, determinable on performance or at the expiration of the period within which only performance can occur. See *Pelham-Clinton* v. *Duke of Newcastle*, '03, A. C. 111; 72 L. J. Ch. 424; 88 L. T. 273.

Condition precedent requiring co-operation of others.

Where the condition which is to precede the vesting of an estate is of a nature to require for its performance the co-operation of a third person, the mere performance by the devisee of his part of the condition will not give effect to the devise, since a testator may, if he chooses, give one person an estate in case another does a certain act and not otherwise; and, if he has so intimated his intention, nothing less than a full compliance with the prescribed condition can entitle the devisee. Thus, if lands are devised to A. in fee when he shall attain the age of twenty-one years, in case, before that event, he shall marry B.; although B. should die in childhood, or marry Z., or refuse to marry A. after overtures from him, the estate nevertheless would not vest, *Lord Falkland* v. *Bertie*, 2 Ver. 333; *Roundel* v. *Currer*, 2 Br. C. 67. On the other hand, if lands were devised to A. in fee, with a proviso that unless A. before the age of twenty-one should marry B., then his estate should cease; if the marriage were prevented by the means before suggested, A.'s estate would become absolute, *Thomas* v. *Howell*, 1 Salk. 170; *Aislabie* v. *Rice*, 3 Mad. 256; 18 R. R. 230. So, if the conditions were, that the devisee should dispose of part of the lands for an illegal purpose, the condition (which is necessarily subsequent, since its performance requires that the devisee should have the estate) would be void and the estate absolute, *Poor* v. *Mial*, 6 Mad. 32; 22 R. R. 227; *Ridgway* v. *Woodhouse*, 7 Be. 437; 64 R. R. 111; see also *Wright* v. *Wilkin*, 2 B. & S. 232. Where a legacy was given to a married woman, upon condition that she conveyed an estate held by her for her separate use with a clause against anticipation,

Condition requiring co-operation of others.

**Notes to Prec. 28.**

it was held that the Court had no power to interfere with this prohibition for the purpose of enabling her to comply with the condition, and the legacy therefore failed, *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; 21 Be. 214; 25 L. J. Ch. 385; 106 R. R. 192. But see now sect. 39 of the Conveyancing Act, 1881, which gives the Court power to bind the interest of a married woman notwithstanding a restraint on anticipation, if it appears to be for her benefit that it should be bound and she consents.

Where estate is devised over on non-performance.

It would seem that the doctrine applicable to conditions subsequent becoming impossible to be performed, does not obtain where the estate is devised over on non-performance; in such case, to hold that the estate of the first devisee had become absolute, would be to adjudge that the estate of the substituted devisee had failed, notwithstanding the happening of the event on which it was given, which would be an unfair and unauthorised interference with the rights of the respective objects of the testator's bounty, and an undue curtailment of the testamentary power.

Effect of a gift over, on breach of a condition.

Hence has arisen the important difference existing in many instances between the effect of a condition which is accompanied by a devise or bequest over, and one that is not so accompanied. Thus, it is clear that where real or personal estate is given to a person in case he shall execute a release, or shall not dispute the will, or shall do or decline to do any other prescribed act, and in default the property is given over, such ulterior devise or bequest will take effect, whatever may be the nature of the property, or of the act which is enjoined or prohibited, *Cleaver* v. *Spurling*, 2 P. W. 526; *Simpson* v. *Vickers*, 14 Ves. 341; *Tulk* v. *Houlditch*, 1 V. & B. 248; 12 R. R. 224; *Burgess* v. *Robinson*, 1 Mad. 172; 3 Mer. 7; *Cooke* v. *Turner*, 14 Sim. 493; 71 R. R. 808; *Cooke* v. *Cholmondeley*, 2 M'N. & G. 18; 19 L. J. Ch. 81; 86 R. R. 7; *Re Dickson's Trusts*, 1 Sim. N. S. 37; *Davis* v. *Angel*, 4 D. F. & J. 524; *Hodgson* v. *Halford*, 11 Ch. D. 959; 48 L. J. Ch. 548; *Wainwright* v. *Miller*, '97, 2 Ch. 255; 66 L. J. Ch. 616; 76 L. T. 718.

Equitable relief against forfeiture, when there is no gift over.

Where there is no devise or bequest over, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. Where lands of inheritance are given upon condition that the devisee pays a sum of money within a definite period, and, the money not being paid, the heir enters for a breach of the condition, a Court of Equity will, notwithstanding the lapse of the prescribed period for performance, restore the estate to the devisee upon payment of principal, interest, and costs, *Salmon* v. *Vaux*, Toth. 105; *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Barnardiston* v. *Fane*, 2 Ver. 366; *Grimston* v. *Lord Bruce*, 1 Salk. 156; 2 Ver. 594; see also *Wallis* v. *Crimes*, 1 Ch. Cas. 89. And this species of relief has been extended to cases less palpably admitting of after-satisfaction, as in *Cage* v. *Russel*, 2 Ven. 352, where a testatrix had devised lands to her executors to pay 500*l.* out of them to her son at the age of twenty-one, provided that, if his father did not execute a certain release to the

**Notes to Prec. 28.**

executors, then the gift of the 500*l.* to the son should be void, and the money should go to the executors; a release was tendered to the father (see *Williams* v. *Knipe*, 5 Be. 273, as to the proper course to pursue), who refused to execute it, but he afterwards offering to do so, the legacy was decreed to be paid to the son, the Lord Chancellor distinguishing this case from a condition requiring marriage with consent, which did not admit of after-satisfaction.

In *Cage v. Russel* no time was prescribed by the testator for the execution of the release, but, according to subsequent cases, even this circumstance would not have excluded equitable relief. Thus, in *Taylor* v. *Popham*, 1 Br. C. 168, a testator gave to A. an annuity of 600*l.* on condition that he should, within three months, execute a release of all demands on the testator's estate; the residuary legatee filed a bill against the annuitant, alleging that a release had been tendered and refused, and insisting that the annuity was forfeited; the annuitant, on the other hand, insisted on his right to release at any time. Lord Thurlow declared the rule to be, that, if the Court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach; he considered that the release which had been tendered had been properly refused, as it extended to other annuities given by the testator to the legatee, which ought not to have been included: it was, therefore, referred to the Master to prepare a proper release, which was done; but the legatee still refusing to execute it, a decree was made absolutely excluding him from the annuity of 600*l.* In this case the absence of an express bequest over was not the avowed ground of determination, but it formed that of the next two cases. Thus, in *Simpson* v. *Vickers*, 14 Ves. 341, a testator bequeathed 1,000*l.*, to be paid within six calendar months after his death to his brother M., upon his then executing to the executrix a release of all claims and demands; and if he refused or declined to do so, the testator revoked the bequest, appointing his sister E. sole executrix: M. did not give the release within the time prescribed; and yet he was held to be entitled to the legacy upon his subsequently releasing all demands. So in *Hollinrake* v. *Lister*, 1 Rus. 500; 25 R. R. 117, where a testator forgave to a debtor all his demands, on condition that within two months after his death he signed a release of all his claims to the property which the testator had given to the debtor's wife: and the testator directed his executors to release the debtor if he signed such release, but not otherwise; no release was executed by the debtor, a doubt being raised whether it ought to be made in favour of his wife or of the testator's estate; Lord Gifford, M.R., was of opinion that the release should be in favour of the wife; and, on the authority of *Taylor* v. *Popham*, *ubi sup.*, held, that, as the condition was not accompanied by a bequest over in default, the Court would relieve against the forfeiture; the executors, therefore, were decreed to execute to the debtor a release from the testator's demands on his making a settlement in favour of his wife of the estate in question.

Conditions, equitable relief.

**Notes to Prec. 28.**

If the devisee's or legatee's title to equitable relief is to depend simply on the fact of the absence of a devise or bequest over, the question is reduced within a very narrow compass; it would merely be necessary to ascertain what amounted to such a devise or bequest; in reference to which it is to be observed, that although in *Cage* v. *Russel* (*ante*, p. 425) it appears to have been considered that a direction that a sum of money which was to be raised by the executors, should, on breach of the condition, go to the executors, was not a bequest over, because no more than the law implied; yet in subsequent cases a direction that the legacy shall fall into the residue has been treated as having the operation of an express bequest over, *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108; 17 R. R. 33. It is clear, however, that a devise or bequest over will not be supplied in order to render a condition effective. Therefore, where a testator had devised a certain estate to A. for life; remainder to the heirs male of the body of B.; remainder to the heirs male of the body of C.; adding a proviso and condition that the persons to whom the estate should come should then change their names and take the testator's: one of the points decided was that this condition, which was held to be a condition subsequent, conferred on the devisee in remainder no title to enter on the breach, there being no express devise over in that event, *Gulliver* v. *Ashby*, 1 W. Bl. 607; 4 Bur. 1929. After all, however, legatees must not presume too confidently on their licence to disregard conditions which are not enforced by a bequest over, since the cases do not very precisely define the limits of the doctrine.

What amounts to a gift over.

Gift over will not be supplied.

Probably the Courts would distinguish between a condition whose performance is in the nature of a personal qualification, such as that of preferring a claim in a prescribed manner or time, and one involving a collateral act admitting of after-performance, such as the execution of a release. Such a distinction is suggested by *Tulk* v. *Houlditch*, 1 V. & B. 248, 259; 12 R. R. 224; and *Burgess* v. *Robinson*, 1 Mad. 172; 3 Mer. 7, where, though there were express bequests over, yet the decisions appear to have been made on grounds independent of this fact, and which seem to countenance the distinction in question. See also *Doe* v. *Lakeman*, 2 B. & Ad. 30; *Woods* v. *Townley*, 11 Ha. 319; 90 R. R. 719; *Priestley* v. *Holgate*, 3 K. & J. 286; *Re Arrowsmith's Trusts*, 2 D. F. & J. 474. It ought to be observed, that, in the case of *Simpson* v. *Vickers*, *ante*, p. 426, where an estate was held to be irrevocably fixed in an executory devisee on the default of a prior devisee to execute a release within the prescribed time, it was contended, on the authority of *The Earl of Northumberland* v. *The Earl of Aylesford*, Amb. 540, that the devisee, by entering into possession of the devised estate, had, according to the doctrine of election, bound himself to execute, and was therefore to be considered as having executed, the release; but Sir W. Grant considered that, as the devisee was heir, and entered in that character, contesting the will, the case did not apply; besides which, he was of opinion that its authority was shaken by *Duke of Montague* v. *Lord Beaulieu*, 3 Br. P.

Cases in which equity exacted a strict compliance with conditions.

**Notes to Prec. 28.**

277, where the House of Lords, reversing a decree of Lord Northington made upon grounds similar to those of the former case, held that a devise over, which was limited to arise on the previous devisee not suffering a common recovery, within a defined period, of certain estates of which he was tenant in tail, to prescribed uses, took effect on account of the devisee's non-compliance with the condition.

Attempt to entail personalty.

(*g*) Any attempt to entail personalty will give the absolute interest therein to that person who, if the subject-matter were realty, would be the first tenant in tail or in fee, *Leventhorpe* v. *Ashbie*, Roll. Ab. 831, pl. 1; Tud. L. C. R. P.; *Harvey* v. *Towell*, 7 Ha. 231; 82 R. R. 84, and the cases there cited; and *Re Lowman*, '95, 2 Ch. 348; 64 L. J. Ch. 567; 72 L. T. 816. The form commonly used in the case of heirlooms merely provides negatively that the chattels shall not vest absolutely in a tenant in tail unless he shall attain twenty-one or die under that age leaving issue in tail; but it seems more correct to devest and limit them over in express terms on that event, see *Rowland* v. *Morgan*, 2 Ph. 764; 78 R. R. 282. In that case it was held that a direction annexed to a bequest of chattels that they shall go as heirlooms does not render such bequest executory, or give the Court any power to modify the legal effect of the bequest, whatever that may be. It seems to be established *first*, that an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the limitations of real estate, vests it absolutely in the first tenant in tail immediately upon his birth, *Hogg* v. *Jones*, 32 Be. 45; 32 L. J. Ch. 361; 8 L. T. 816; *In re Cresswell*, 24 Ch. D. 102; 52 L. J. Ch. 798; 49 L. T. 590; and this, whether the limitations of the personalty be expressed *in extenso*, or created by reference to the limitations of the real estate. Such reference may be effectually made, either by expressly saying that the chattels are to go on the same uses as the real estate, or by declaring that they are to be treated as heirlooms. *Secondly*, the addition of the words "so far as the rules of law and equity will permit," and the circumstances also of the legal interest being left in executors or trustees, will not prevail in any way to alter the general rule, or to render, in other words, the trust executory instead of executed, *Vaughan* v. *Burslem*, 3 Br. C. 101; *Christie* v. *Gosling*, L. R. 1 H. L. 279. *Thirdly*, where the trusts are executory, there has been considerable difference of opinion: if the law can be considered as finally settled by authority, it is in favour of a construction which would introduce particular conditions, such as the attainment of twenty-one, into the limitations, *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 218; 4 R. R. 31; and see *Shelley* v. *Shelley*, L. R. 6 Eq. 540; 37 L. T. 357. *Fourthly*, doubtful words, tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the previous canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained, *Foley* v. *Burnell*, 1 Br. C. 274; *Re Johnson's Trusts*, L. R. 2 Eq. 716; see also *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; 29 L. J. Ch. 249; *Sackville-West* v. *Viscount*

Heirlooms: chattels to go with freeholds; vesting clause.

Heirlooms.

**Notes to Prec. 28.**

*Holmesdale*, L. R. 4 H. L. 543; 39 L. J. Ch. 505; *Miles* v. *Harford*, 12 Ch. D. 691; 41 L. T. 378. But chattels bequeathed as heirlooms upon trust to go along with, and be enjoyed by, the person for the time being entitled under a settlement to the "actual" possession of real estate, do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life, *Re Angerstein*, '95, 2 Ch. 883; 65 L. J. Ch. 57; 73 L. T. 500; *In re Fothergill's Estate*, '03, 1 Ch. 149; 72 L. J. Ch. 164; 87 L. T. 677. And in order to deprive a tenant in tail of the chattels to which, on coming into the actual possession of the real estate under the limitations of the will, he would, according to the above rules, be entitled, it is necessary that his exclusion from possession of the realty should arise from some act or disposition of the testator, and not from any foreign circumstance (such as the execution of a disentailing deed) over which the testator had not and could not have control, *Hogg* v. *Jones*, 32 Be. 45; 32 L. J. Ch. 361; 8 L. T. 816.

Heirlooms.

As to the necessity for a limitation over on the death of any tenant in tail "by purchase," see Jarm. Wills, Ch. XLIV. In *Gosling* v. *Gosling*, 32 Be. 58; 32 L. J. Ch. 233; 7 L. T. 579, personal estate was bequeathed to trustees to be held upon the trusts declared of real estate strictly settled, with a proviso that the personalty should "not vest absolutely in any tenant in tail unless such person should attain the age of twenty-one years"; the Master of the Rolls held that the proviso was an integral part of the gift; consequently that the limitation was in substance to the first tenant in tail (whether by purchase or descent) who should attain twenty-one, and therefore was void for remoteness; his Honour also held that the bequest was not an executory trust; but this decision was reversed by Lord Westbury, 1 D. J. & S. 1, on the ground that the "tenant in tail" in the proviso necessarily referred to a tenant in tail of the realty who would, under the trust by reference, also take the personalty, and therefore, as the personalty could not descend, the "tenant in tail" of the proviso was, on the context, to be read and construed as "tenant in tail by purchase"; this decision was affirmed by the House of Lords, *Christie* v. *Gosling*, L. R. 1 H. L. 279; 35 L. J. Ch. 667; 15 L. T. 40, but depending as it did on the special terms and dispositions of the particular will, is not to be regarded as an authority for the general omission of the express restriction to tenants in tail "by purchase." See also *Harrington* v. *Harrington*, L. R. 5 H. L. 87; 40 L. J. Ch. 716; *Martelli* v. *Holloway*, L. R. 5 H. L. 532; 42 L. J. Ch. 26.

Gift over on death of tenant in tail "by purchase";

See L. R. 5 H. L. 93, n. (3), for forms of bequests of heirlooms, drawn by Butler, Coote, Brodie, Duval, and others.

It frequently happens that chattels real and heirlooms are made subject to an executory limitation over on the death of tenant in tail by purchase under the age of twenty-one years, "without leaving issue in tail living at his or her death"; if the tenant in tail dies under twenty-one, leaving issue in tail, the executory gift over does not take effect, and (the tenant in tail necessarily dying intestate) the chattels become the property of his next of kin. On the other hand, if the limitation

—under twenty-one "without leaving issue in tail."

**Notes to Prec. 28.**

Heirlooms.

over is on the death of tenant in tail under the age of twenty-one simply, and he (as above supposed) dies under that age leaving issue in tail, then the executory gift takes effect in favour of such issue, and the chattels real and heirlooms are kept in union with the freeholds for one step or generation further. If, therefore, the object is to make the personalty devolve with the freeholds as far as possible, the words "without leaving issue in tail living at his or her death," should be omitted.

As to what chattels were or were not included in a bequest of heirlooms, see *Hare* v. *Pryce*, 11 L. T. 101; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; 36 L. J. Ch. 107; *Moir* v. *Warner*, W. N. 1882, p. 139. In *Fane* v. *Fane*, 2 Ch. D. 711; 46 L. J. Ch. 174, an order was made for the sale of heirlooms; but see *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635; 45 L. J. Ch. 741.

(*h*) See note (*g*), Prec. VIII.

(*i*) Sect. 37 of the Settled Land Act, 1882, enacts that a tenant for life of lands may sell chattels settled as heirlooms, but as he cannot do so without the order of the Court, the clause in the text may be found useful.

(*k*) See note (*b*), Prec. XXV.

(*l*) See note (*b*), Prec. XV.

(*m*) Trustees having power to invest in the purchase of hereditaments in fee simple in possession may purchase freehold ground-rents, *In re Peyton's Settlement Trust*, L. R. 7 Eq. 463; 38 L. J. Ch. 477; 20 L. T. 728.

(*n*) This clause is applicable only where the real and personal estates are intended to go in different directions.

(*o*) See note (*f*), Prec. VI.

(*p*) See note (*g*), Prec. XII.

(*q*) See note (*g*), Prec. XXIII.

## No. XXIX.

*Will devising Real Estates to the Uses of a Settlement made upon the Testator's Marriage.*

THIS IS THE WILL of me [*testator's name &c.*] WHEREAS by the settlement dated the —— day of —— 19— made in contemplation of my marriage with my wife [*name*] divers hereditaments therein described were settled by me to the use of myself for life With remainder (subject to limitations for securing a jointure rent-charge to my wife if she shall survive me for her life and to a term of five hundred years for raising portions of our younger children) to the first and other sons of our marriage successively in tail male with remainders over Which settlement contains divers powers and provisions concerning the said hereditaments Now I DO HEREBY DEVISE AND SUBJECT all the hereditaments of which I am or shall at the time of my death be competent to dispose To such of the uses trusts powers and provisions contained in the said settlement concerning the hereditaments thereby settled posterior to the limitation of the said term of five hundred years as at the time of my death shall be capable of effect AND I CONFIRM the said settlement (*a*) IN WITNESS &c.

Recital of settlement.

Real estates subjected thereto.

**NOTES to Precedent XXIX.**

(*a*) This will relating exclusively to real estate, and not containing any appointment of executors, does not require probate. But if executors were named, or the will related to personal as well as to real estate, see, as to the effect of this confirmation of the settlement, and the necessity of probate of the settlement, as being incorporated with the will, *ante*, p. 18. But this note must be read subject to the provisions of sect. 1 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), as to probate and letters of administration being granted in respect of real estate only.

**Prec. 30.**

## No. XXX.

CODICIL *revoking the Appointment of Two of Three Trustees and Executors and substituting others.*

THIS IS A CODICIL (*a*) TO THE WILL of me [*testator's name &c.*] which will bears date the —— day of —— 19— WHEREAS by my said will I have devised and bequeathed certain real and personal estate and given certain powers to [*three trustees*] as trustees and appointed them executors and bequeathed to them a legacy of £—— apiece Now I REVOKE my said will so far as the said [*two of the three trustees*] are objects thereof and substitute [*names &c. of substituted trustees*] in their place and I DECLARE that my said will shall take effect in the same manner as if the names of the said [*substituted trustees*] had been originally inserted throughout the said will instead of the names of the said [*two original trustees*] AND I CONFIRM my said will in other respects IN WITNESS &c. (*b*).

**NOTES to Precedent XXX.**

As to codicils.

(*a*) The old signification of the word "codicil" was "a testament not containing the appointment of an executor." But in modern acceptation it denotes simply a supplement to a will, the object of which may be to revoke, confirm, explain, or alter, either wholly or partially, the dispositions of the principal instrument, and, as such, it is, in general, to be considered as part of the original will. Where a testator by codicil confirms his will, the will together with all previous codicils is confirmed, *Green* v. *Tribe*, 9 Ch. D. 231, 47 L. J. Ch. 783; 38 L. T. 914.

Probate of codicils.

Two or more wills or codicils may be entitled to probate, if there is no contradiction or ambiguity upon the face of the instruments, leading by necessary implication to the inference that the testator intended the later to be revocatory of, or substitutional for, the earlier, *Thorne* v. *Rooke*, 2 Cur. 799. But if the instruments are of a different tenor, the later supersedes the earlier, *Bryan* v. *White*, 14 Jur. 919, where two wills were made on two successive days. A so-called codicil, duly executed, though merely revoking prior wills, and making no disposition

**Notes to Prec. 30.**

of the testator's property, is a testamentary instrument entitled to probate, *Brenchley* v. *Still*, 2 Rob. 162; *Brenchley* v. *Lynn*, *ib.* 441; but a mere memorandum of revocation, not disposing of any property or appointing executors, is not entitled to probate, but administration will be granted to the next of kin, with the memorandum annexed, *In b. Hubbard*, L. R. 1 P. & D. 53; 35 L. J. P. 27; *In b. Hicks*, L. R. 1 P. & D. 683; 38 L. J. P. 65; 21 L. T. 300; *In b. Fraser*, L. R. 2 P. & D. 40; 39 L. J. P. 20; 21 L. T. 680; *In b. Durance*, L. R. 2 P. & D. 406; 41 L. J. P. 60; 26 L. T. 983; *Toomer* v. *Sobinska*, '07, P. 106; 76 L. J. Ch. 19; 96 L. T. 475. A paper called a last will and testament, disposing only of real estate, and not revoking a prior will or appointing executors, was admitted to probate as a codicil, *In b. Langhorn*, 5 No. Cas. 512. But as to probate of wills relating only to real estate, see the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sect. 1 (3). A codicil to a will may be admitted to probate, although the will itself is not forthcoming, *In b. Hallilwell*, 9 Jur. 1042; *Tagart* v. *Hooper*, 1 Cur. 293; *In b. Coulthard*, 11 Jur. N. S. 184; *In b. Clements*, '92, P. 254; 61 L. J. P. 130; 67 L. T. 356. Where there were two codicils, one executed on the 23rd July and the other on the 30th *totidem verbis*, except the substitution of a clause and the addition of a legacy, there being nothing in the second to revoke the first, both were admitted to probate, *In b. Beetson*, 6 No. Cas. 13. In this case parol evidence to the effect that the second codicil was intended to be in substitution for the first was received but not acted upon. A codicil was executed in duplicate, and one part was destroyed on the execution of a substituted codicil: the remaining duplicate was not admitted to probate, *In b. Hains*, 5 No. Cas. 621.

See also the notes to ss. 20, 22, *ante*, pp. 39, 52.

Valid execution of codicil extends to will or prior codicil, in itself invalid,

A will or codicil, not duly executed and attested, is made valid by a subsequent codicil, duly executed and attested, and referring to the will or prior codicil, *In b. Smith*, 2 Cur. 796; *In b. Wollaston*, 3 No. Cas. 599; *Ingoldby* v. *Ingoldby*, 4 No. Cas. 493; *In b. Drummond*, 2 Sw. & Tr. 8; and see, as to the acknowledgment of a codicil being an acknowledgment of all the testamentary papers, *In b. Jenner*, 6 Jur. 564. But an unattested codicil is not part of a will so as to be rendered valid by a later well-executed codicil referring to the will alone, *In b. Phelps*, 6 No. Cas. 695; *Haynes* v. *Hill*, 7 No. Cas. 256. Where the virtue of a due execution of a later testamentary instrument is to be extended to prior instruments in themselves invalid, there must be a clear reference in the valid instrument to the invalid—a reference not necessarily in express terms, but sufficient to show, by clear implication and reasonable influence, that the invalid instruments were present to the mind and contemplation of the testator when executing the later instrument, and formed part of his entire testamentary scheme. Where a will and codicil are written on the same piece of paper, less evidence of reference and identity is necessary than when such is not the case, *In b. Terrible*, 1 Sw. & Tr. 140. Thus a writing called "a codicil to my will," which

if there is sufficient reference to make the prior instrument capable of identification.

**Notes to Prec. 30.**

writing was on the same paper with an instrument purporting to be the testator's will, but which was informally executed—the codicil being of course well executed and subsequent in date to the so-called will—gave effect to the latter, *In b. Warrender*, 2 L. T. O. S. 317. But where a will and two codicils were all written on the same paper, the first codicil unattested, the second well executed, and referring to the will, but not to the prior codicil, the will and second codicil only were admitted to probate, *In b. Hutton*, 5 No. Cas. 598; and see *In b. Willmott*, 1 Sw. &

Codicils.

Tr. 36. A will and codicil, on the same paper, were executed at the same time—the codicil annulling to a great extent the dispositions of the will: it was held that this circumstance was not sufficient to discredit the instruments, and probate was granted of the will and codicil, *Biddles* v. *Biddles*, 3 Cur. 458. But where a will and codicil on the same paper were executed at the same time, the will duly executed but the codicil merely signed, probate of the will only was decreed, *In b. Taylor*, 15 Jur. 1090. See further as to the identification of invalid codicils and the incorporation of unattested documents, *Countess de Zichy Ferraris* v. *Marquis of Hertford*, 3 Cur. 468; 8 Jur. 863; *In b. Littledale*, 13 Jur. 478; *In b. Megarey*, 14 Jur. 318, and the cases there cited; *In b. Hunt*, 2 Rob. 622; *In b. Stewart*, 3 Sw. & Tr. 192; 32 L. J. P. 94; *In b. Allnutt*, 3 Sw. & Tr. 167; 33 L. J. P. 86; *Stockil* v. *Punshon*, 6 P. D. 9; 50 L. J. P. 14; 44 L. T. 280. In *Ollive* v. *Weale*, 5 No. Cas. 486, in consequence of insufficient reference, probate was refused of two codicils signed by the testator, although in the will he had directed that "all codicils added, if signed by me, after executing this will, shall be equally valid as if placed in the body of this same will," and although the codicils in question were written on the same piece of paper with the will. But in *In b. Childes*, 4 No. Cas. 36, probate was granted of two papers held together by a pin, of which the second only was attested, and did not expressly refer to the first.

As to identification of the prior instrument.

A prior instrument may be identified otherwise than by its date, as by reference in a codicil to legacies given by the will, *In b. Dickin*, 2 Rob. 298; in that case, the well-executed codicil, not fastened to, or, otherwise than as above, referring to, the informally executed will, rendered the latter valid. In *Allen* v. *Maddock*, 11 Moo. P. C. 427, a duly-executed paper was headed, "This is a codicil to my last will," but contained no other reference to the will; it was held, by the Privy Council,

Parol evidence.

that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, in such terms as to make it capable of identification, it is a subject for parol evidence; and the above reference was held sufficient to identify an informally executed paper which was found in the testatrix's bedroom. See also *In b. Almosnino*, 1 Sw. & Tr. 508; 29 L. J. P. 46; 2 L. T. 191; *In b. Watkins*, L. R. 1 P. & D. 19; 35 L. J. P. 14; 13 L. T. 445; *Eyre* v. *Eyre*, '03, P. 131; 72 L. J. P. 45; 88 L. T. 567. But the principle of incorporation, as laid down in *Allen* v. *Maddock*, will not be extended, *In b. Greves*, 1 Sw. & Tr. 250; 28 L. J. P. 18. See also *University College of North*

**Notes to Prec. 30.**

*Wales* v. *Taylor*, '08, P. 140; 77 L. J. P. 20; 98 L. T. 472. See further as to the incorporation of unattested documents, the notes to sect. 9 of the Wills Act, *ante*.

Revival by reference in later instrument.

A mere reference in a duly-executed codicil to "my last will," when it appeared that only one will was in existence, was held sufficient to revive a will and codicil (both well executed) which had been revoked by marriage, *Neate* v. *Picard*, 2 No. Cas. 406. But where a testator made a will in May, 1866, and a codicil in May, 1871, revoked both by will in November, 1871, and in 1872 executed a codicil to his "will dated May, 1866," that will only was revived, and not the codicil of 1871, *In b. Reynolds*, L. R. 3 P. & D. 35; 42 L. J. P. 20; 28 L. T. 144. And the rule that a codicil confirming a will makes the will for many purposes bear the date of the codicil is subject to the limitation that the testator's intention is not thereby defeated, *Doe* v. *Hole*, 15 Jur. 13; 81 R. R. 836.

Where by a codicil dated 21st July, 1882, expressed to be a codicil to his will of 17th July, 1880, a testator confirmed the said will, and it appeared that the said will consisted not merely of the document of 17th July, 1880, but also of an intermediate codicil, dated 17th June, 1882, which revoked a particular bequest contained in the document of 17th July, 1880, it was held that though a reference simply to the date of the first document was not sufficient in itself to restrict the confirmation to that particular document alone, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th of July, 1880, after confirmation, was no longer affected by the partial revocation made by the codicil of 17th June, 1882, *McLeod* v. *McNab*, '91, A. C. 471; 60 L. J. P. C. 70; 65 L. T. 266.

Mistakes in codicils.

Mistakes in codicils are of course treated similarly to mistakes in wills; thus where the word "revoke" was written by an attorney in a codicil instead of "confirm," and the testator did not notice the error, the Court refused to alter the word to "confirm," *In b. Davy*, 1 Sw. & Tr. 262; 29 L. J. P. 161. As to a mistake in the number of codicils (as where a testator called a third codicil the second), see *Bunny* v. *Hemsted*, 3 No. Cas. 593.

Revocation of a gift by codicil.

The revocation by codicil of a bequest is a revocation of a pecuniary legacy to be paid out of that bequest, *Grice* v. *Funnell*, 1 S. & G. 130; 96 R. R. 348.

The *onus* is upon those who claim under a codicil, as against a devisee under the will, to show that the intention to displace the devisee is equally clear with the original intention to devise, *Doe d. Hearle* v. *Hickes*, 1 C. & F. 20. See also *Maddison* v. *Chapman*, 4 K. & J. 709; *Barclay* v. *Maskelyne*, Joh. 124; *Robertson* v. *Powell*, 2 H. & C. 762.

Where a testator, by the last of several codicils, confirms his will and some of the codicils thereto, mentioning the dates, but omits all mention of the other codicils, the whole of the codicils and the will must be looked at for the purpose of deciding whether the undermentioned codicils were intended to be revoked, *Smith* v. *Cuningham*, 1 Addams, 448; *Greenough* v. *Martin*, 2 Addams, 239; *Crosbie* v. *Macdoual*, 4 Ves. 610;

**Notes to Prec. 30.**

4 R. R. 301; *Booker* v. *Allen*, 2 Russ. & My. 270; 34 R. R. 91; *In b. De la Saussaye*, L. R. 3 P. & D. 42; 42 L. J. P. 47; 28 L. T. 368; *Follett* v. *Pettman*, 23 Ch. D. 337; 52 L. J. Ch. 521; 48 L. T. 865.

A bequest, in a second codicil, of all the testator's property "not hereinbefore or by my will or any other codicil disposed of," was held to revoke a general residuary bequest contained in the will, *Earl of Hardwicke* v. *Douglas*, 7 C. & F. 795.

A distinction must be made between a revocation of a gift and a revocation of so much of the will as contains the gift. The effect of these two modes of revocation may be different: thus if there is a bequest to several persons by name, as tenants in common, and by codicil the bequest to one of them is revoked, his share will not accrue to the others, *Lightfoot* v. *Burstall*, 1 H. & M. 546; *In re Barker's Estate*, 15 Ch. D. 635; but see *Crawshaw* v. *Crawshaw*, 14 Ch. D. 817; 49 L. J. Ch. 662; 43 L. T. 309; if, however, the testator revokes so much of his will as contains the bequest to A., then the will is read as if the name of A. did not occur in it, and the other tenants in common thus obtain the benefit of the whole original bequest, *Harris* v. *Davis*, 1 Col. 416; 66 R. R. 130. In *Re Palmer*, '93, 3 Ch. 369; 62 L. J. Ch. 988; 69 L. T. 477, a testator by his will gave his residuary real and personal estate upon trust, as to two-fifth parts, for his daughters, M. and A., and all other daughters born in his lifetime, equally. By a codicil he declared that the share given to M. should be restricted to a life interest only, and that upon her death it should fall into and form part of his residuary estate. *Held* (overruling *Humble* v. *Shore*, 7 Hare, 247; 82 R. R. 95), that the share of M. after her death, did not pass to the testator's next of kin as undisposed of, but was divisible between the other residuary legatees. See also *In re Parker*, '01, 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116; *In re Allan*, '03, 1 Ch. 276; 72 L. J. Ch. 159; 88 L. T. 246; *In re Wand*, '07, 1 Ch. 391; 76 L. T. Ch. 253; 96 L. T. 425.

Dispositions of will, not disturbed more than necessary.

Where a codicil affects the dispositions of a will or prior codicil, it is an established rule not to disturb the dispositions of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil, see Jarm. Wills, 139; *Alt* v. *Gregory*, 8 D. M. & G. 221; *Williams* v. *Williams*, 8 Ch. D. 789; 47 L. J. Ch. 857; 39 L. T. 180; *In re Towry's Settled Estate*, 41 Ch. D. 64; 58 L. J. Ch. 593; 60 L. T. 715. See also, *In re Whitehorne*, '06, 2 Ch. 121; 75 L. J. Ch. 537; 94 L. T. 698. Thus, a testator, by his will, made a gift for life to the separate use of his three nieces, with remainder to their children; by a codicil he directed that each of his nieces should have a vested interest, transmissible to her children upon her death; it was held that the nieces took to their separate use, since the will, so far as it was not altered, remained, *Vesey* v. *Vesey*, 12 Jur. 548. In *Re Freme's Contract*, '95, 2 Ch. 778; 64 L. J. Ch. 862; 73 L. T. 366, a testator gave an annuity of 300*l.* to be paid to his granddaughter A., and directed that after her death the said sum of 300*l.* should be paid to her children as she should

**Notes to Prec. 30.**

appoint, and in default of appointment to her children equally. By codicil, after reciting that he had given "to his granddaughter A. an annuity of 300*l.*," he revoked the bequest of "the said annuity," and "instead thereof" gave "to his granddaughter A." an annuity of 150*l.* to be payable in the same manner as the 300*l.* was payable. The children of A. were not referred to in the codicil. *Held*, that the effect of the codicil was to substitute an annuity of 150*l.* for the annuity of 300*l.* as to A.'s children as well as herself. See also *Butler* v. *Greenwood*, 22 Be. 303, as to the revocation by codicil of a discretionary power given by will.

Confirmation of will by codicil.

A general confirmation of a will by a codicil acts upon the will as it existed at the time of execution of the codicil; consequently if a legacy has been revoked, satisfied, or adeemed prior to the execution of the codicil in question, such legacy is not revived by the codicil. But, of course, if the codicil contains more than a general confirmation of the will, *e.g.* if it refers to the particular legacy, treats it as an existing legacy, and gives something in addition, then the above rule does not apply, *Hopwood* v. *Hopwood*, 22 Be. 493; but see 7 H. L. C. 728.

A codicil which confirmed a will, by which latter the testator had attempted to exercise a power of appointment which at the date of the will he did not possess, though he did possess the power at the date of the codicil, was held a valid exercise of the power, *In re Blackburn*, 43 Ch. D. 75; 59 L. J. Ch. 208.

Gifts by recital or implication.

That a recital in a will or codicil is a sufficient devise—*e.g.* if a testator recites that he has in the first part of his will given such an estate to A. that estate passes to A., though no such gift actually occurs in the will—see *Yates* v. *Thomson*, 3 C. & F. 572; 39 R. R. 40. But to establish a gift of this nature, the recital of having given must be clear and unambiguous; and an erroneous recital in a codicil of an existing bequest contained in the will will not constitute a new bequest, *Mackenzie* v. *Bradbury*, 35 Be. 617; 34 L. J. Ch. 627. And as to gifts by recital or implication, see *Edmunds* v. *Waugh*, 4 Drew. 275; *Ashton* v. *Horsfield*, 6 Jur. N. S. 355; 2 L. T. 1; *Re Turner*, 2 D. F. & J. 527; 30 L. J. Ch. 144; 3 L. T. 573; *Re Smith*, 2 J. & H. 594. In *Jordan* v. *Fortescue*, 10 Be. 259; 16 L. J. Ch. 332; 76 R. R. 121, by a third codicil, a testator gave to A. "500*l.* in addition to 1,500*l.* which I have before bequeathed to him;" in fact the testator had before bequeathed only 1,000*l.* to A. in two sums of 500*l.* each; it was held that the legatee was entitled by implication to 2,000*l.* See also *Hall* v. *Leitch*, L. R. 9 Eq. 376; 23 L. T. 298; *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800; *Sweeting* v. *Prideaux*, 2 Ch. D. 413; 45 L. J. Ch. 378; 34 L. T. 240; *In re Redfern*, 6 Ch. D. 133; 47 L. J. Ch. 17; 37 L. T. 241; Theobald, Constr. Wills, 742 *et seq.* As to revocation by implication, see *Darley* v. *Langworthy*, 3 Br. P. 359; *Francis* v. *Collier*, 4 Rus. 331; *Bridges* v. *Strachan*, 8 Ch. D. 558; 38 L. T. 502. A devise to the testator's heir-at-law after the death of A. gives A. an estate for life by implication, *Ralph* v. *Carrick*, 11 Ch. D. 873; 48 L. J. Ch. 801;

**Notes to Prec. 30.**

40 L. T. 505; *In re Willatts*, '05, 2 Ch. 135; 74 L. J. Ch. 564; 93 L. T. 256; and, similarly, a bequest after the death of A. to the testator's next of kin according to the statute will give A. a life interest by implication in personalty, *Re Springfield*, '94, 3 Ch. 603. As to the implication of a gift to the objects of a power of appointment from the absence of a gift over in default of appointment, see *Re Weekes' Settlement*, '97, 1 Ch. 289; 66 L. J. Ch. 179; 76 L. T. 112.

Legacies, cumulative or substitutional.

Where two legacies or annuities are given to the same person, one by will, and the other by codicil, it should be expressly declared whether the latter is to be construed as cumulative or substitutional, *Suisse* v. *Lord Lowther*, 2 Ha. 424; 62 R. R. 170; *Lee* v. *Pain*, 2 Ha. 201; 67 R. R. 41; *Roch* v. *Callen*, 6 Ha. 531; 77 R. R. 224; *Kidd* v. *North*, 2 Ph. 91; 78 R. R. 32; *Tweedale* v. *Tweedale*, 10 Sim. 453; *Hartley* v. *Ostler*, 22 Be. 449. Where a legacy is given in each of two separate instruments, the presumption is in favour of the intention to make two gifts, *Wilson* v. *O'Leary*, L. R. 7 Ch. 448; 41 L. J. Ch. 342; 26 L. T. 463; but this presumption may be rebutted by circumstances, *Russell* v. *Dickson*, 4 H. L. C. 293; 94 R. R. 116; *Whyte* v. *Whyte*, L. R. 17 Eq. 50; 43 L. J. Ch. 104; and the general rule, that the gift of two different sums will be deemed cumulative, may be controlled by a clear intention to the contrary, *Marquis of Hertford* v. *Lord Lowther*, 1 R. P. & Conv. Cas. 421. If in both the testamentary instruments the same motive for the gift is expressed and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift, *Tatham* v. *Drummond*, 3 N. R. 706. But this presumption arises only where the double coincidence occurs; and does not arise if in either instrument there is no motive, or a different motive expressed, although the sums are the same; nor does it arise, though the same motive is expressed in both instruments, if the sums are different, *Hurst* v. *Beach*, 5 Mad. 358; 21 R. R. 304.

Extrinsic evidence.

This of course does not apply to cases where the second instrument affords intrinsic evidence of intended substitution; but extrinsic evidence is inadmissible to show that the testator intended the second gift as substitutional and not as cumulative, *ib.* In *Hubbard* v. *Alexander*, 3 Ch. D. 738; 45 L. J. Ch. 740; 35 L. T. 52, evidence was admitted to show that two codicils in the same words, but executed at different times, were not two instruments, but one a mere duplicate of the other, so that the legatee therein named was entitled to one legacy only. See also *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96; 5 L. T. 660; *Brennan* v. *Moran*, 6 Ir. Ch. Rep. 126; *Tuckey* v. *Henderson*, 33 Be. 174; *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69; 37 L. J. Ch. 521; 18 L. T. 392; Hawkins, Constr. Wills, 303.

Care should also be taken to show distinctly whether a gift by codicil to a legatee under the will is payable out of the same fund, and is privileged with the same exemptions, or subject to the same restrictions, as the legacy given by the will, see Jarm. Wills, 150; *Johnstone* v. *Lord*

**Notes to Prec. 30.**

*Harrowby*, 1 D. F. & J. 183; 29 L. J. Ch. 145; 1 L. T. 390; *Fisher* v. *Brierley*, 30 Be. 265; *Jauncey* v. *Attorney-General*, 3 Gif. 308; 5 L. T. 374; *Re Smith*, 2 J. & H. 594; *Re Gibson*, *ib.* 673; Hawkins, Constr. Wills, 306.

(*b*) The attestation clause forms no part of a codicil. Therefore where the attestation clause of a third codicil was as follows: "Signed by the said [testatrix] as a third codicil to her will by which the first codicil is cancelled," and the first codicil was not in the body of the third codicil cancelled at all, the first was held not to be cancelled, but to be entitled to probate, *In b. Atkinson*, 8 P. D. 165; 52 L. J. P. 80.

## No. XXXI.

CODICIL *appointing a Trustee and Executor in the place of One deceased.*

THIS IS A SECOND CODICIL TO THE WILL of me [*testator's name &c.*] which will bears date (*a*) the —— day of —— 19— WHEREAS [*name*] named in my said will as a trustee and executor has lately died Now it is my will that [*name &c.*] shall be substituted in the place of the said [*deceased trustee*] as one of the trustees and executors (*b*) of my said will AND I DIRECT that my said will shall be read and construed as if the name of the said [*substituted trustee*] had been inserted throughout the said will (*c*) in the place and instead of the name of the said [*deceased trustee*] AND except as aforesaid I CONFIRM my said will and the first codicil thereto IN WITNESS &c.

### NOTES to Precedent XXXI.

Mistaken reference to will, by date.

(*a*) Where a testator has previously made more than one will, the later revoking the earlier, it needs scarcely to be said that care should be taken, in referring to the existing will by its date, that the date of the revoked will be not inserted in the codicil by mistake, see *In b. Steele, In b. May, In b. Wilson,* L. R. 1 P. & D. 575; 37 L. J. P. 72, n.; 19 L. T. 91, three cases occurring in the Court of Probate within the same month, in each of which there was a mistaken reference by date in a codicil to a revoked will, instead of the revoking will. See also *In b. Ince,* 2 P. D. 111; 46 L. J. P. 30; 36 L. T. 519; *In b. Stedham,* 6 P. D. 205; 50 L. J. P. 75; 45 L. T. 192; *In b. Dyke,* 6 P. D. 207; *In b. Gordon,* '92, P. 228; 61 L. J. P. 132; 67 L. T. 328.

Trustee, executor, revocation.

(*b*) Where the same person is appointed both trustee and executor, a revocation of the appointment as executor is not necessarily a revocation of the appointment as trustee, *Cartwright* v. *Shepheard,* 17 Be. 301; 99 R. R. 159; *Worley* v. *Worley,* 18 Be. 58; 104 R. R. 368; and similarly the trusteeship may be revoked and the executorship remain. In *Re Park,* 14 Sim. 89; 65 R. R. 550, the revocation of an appointment of executors and trustees was held not to affect the

**Notes to Prec. 31.**

appointment of the same persons as guardians. In *Sidebotham* v. *Watson*, 11 Ha. 170; 90 R. R. 628, an appointment of a person as trustee and executor was, under the circumstances, held to be appointment as an executor only, and not as a trustee of the express trusts of the will. See also *Moss* v. *Bardswell*, 3 Sw. & Tr. 187; 29 L. J. P. 147; 2 L. T. 300.

(*c*) Care should be taken, where a new trustee is nominated in the place of one who has died or whose appointment is revoked, that the substituted trustee is also clothed with the legal estate in the realty devised upon trust, see *Re Turner*, 2 D. F. & J. 527; 30 L. J. Ch. 144; 3 L. T. 573; *Bennett* v. *Bennett*, 2 Dr. & S. 266; 34 L. J. Ch. 34; 11 L. T. 362. This is effected by the direction in the text.

New trustee, legal estate.

# MISCELLANEOUS FORMS.

Commencements of wills.

I A. B. of &c. hereby revoke all my prior testamentary dispositions and declare this to be my last will made this —— day of —— 19—.

THIS IS THE LAST WILL AND TESTAMENT of me —— of —— in the county of —— gentleman.

THIS IS THE LAST AND ONLY (*a*) will of me A. B. late of —— but now of —— merchant to take effect only in the event of my not leaving any issue living at my death.

(*a*) The insertion of the word "only" is equivalent to a revocation of prior wills. See 11 Byth. Jarm. 429 (*c*).

I A. B. of —— in the county of —— in England late a captain in His Majesty's —— Regiment of Foot a domiciled Englishman but now residing temporarily (*b*) for the benefit of my health [*or* for the purposes of study *or* for the education of my children] at —— in France do make my last will and testament (*c*) as follows :—

(*b*) As to the effect given to a testator's description of himself in his will, in respect of his domicile, and the permanent and temporary nature of his residence abroad, see *Re Steer*, 3 H. & N. 594 ; 28 L. J. Ex. 22 ; *Attorney-General* v. *Pottinger*, 6 H. & N. 733 ; 30 L. J. Ex. 284 ; 4 L. T. 368 ; *Attorney-General* v. *Kent*, 1 H. & C. 12 ; 31 L. J. Ex. 391 ; 6 L. T. 864. A declaration of intention to retain an English domicile, though entitled to weight, will not prevail against facts showing the acquisition of a foreign domicile. See further in the Appendix on domicile.

(*c*) This will should be executed and attested as required by the law of England, but by virtue of 24 & 25 Vict. c. 114 (see Appendix), would be entitled to probate in this country, and be valid as to personal estate, if executed according to the forms required by the law of France.

I APPOINT —— of &c. and —— of &c. to be executors (*d*) of my will. Appointment of executors.

(*d*) An appointment of executors written lengthwise in the margin of a will, the execution being at the foot of the disposing part was excluded from the probate, *In b. Tookey*, 5 No. Cas. 386. But an appointment of executors, written across a will drawn on a printed form, was included in the probate, there being some facts from which the Court inferred that the appointment of executors was written before the execution of the will, *In b. Ryton*, 5 No. Cas. 406.

Where a testator left the residue of his property unto his "wife A. and son B. as whole and sole executrix," the Court granted probate to the two conjointly, *In b. Court*, 2 Sw. & Tr. 485; 31 L. J. P. 61; 6 L. T. 658. And see *In b. Sawtell*, 2 Sw. & Tr. 448; 31 L. J. P. 65; 6 L. T. 395, a case in which no person could be found answering the description of the executor nominated in the will. The nomination of a second set of executors is not a revocation of the appointment of a former set, but all are entitled to come in and join in probate, *In b. Leese*, 2 Sw. & Tr. 442; 31 L. J. P. 169; 5 L. T. 848; and see *Geaves* v. *Price*, 3 Sw. & Tr. 71; 32 L. J. P. 113; 8 L. T. 610; *à fortiori*, a second will disposing of all the testator's property, but making no appointment of executors, does not revoke an appointment of executors in the first will, *In b. Griffith*, L. R. 2 P. & D. 457; 26 L. T. 780. But the appointment by codicil of a *sole* executor is a revocation of an appointment of other persons in the will, *In b. Lowe*, 3 Sw. & Tr. 478; 33 L. J. P. 155; *In b. Baily*, L. R. 1 P. & D. 628; 20 L. T. 278. In *In b. Baylis*, 2 Sw. & Tr. 613; 31 L. J. P. 119; 7 L. T. 251, the testator appointed "A. as my executor with any two of my sons," the appointment of any two sons was held void for uncertainty; and the appointment of "one of my sisters," there being three, was held void for uncertainty, though two of them died in the testator's lifetime, *In b. Blackwell*, 2 P. D. 72; 46 L. J. P. 29; 36 L. T. 413. Where a testator gave a legacy to each "executor and witnesses," but without naming any executor, notwithstanding the words "executors and witnesses" opposite the names of the attesting witnesses, it was held that there was no appointment of executors, *In b. Woods*, L. R. 1 P. & D. 556; 37 L. J. P. 23; 17 L. T. 583. In *In b. Wilkinson*, '92, P. 227; 61 L. J. P. 134; 67 L. T. 328, a testatrix appointed A. and B. trustees of her will, and expressed her wish that they should pay her funeral and other debts. An affidavit showed that the word "executors" had been in the original draft, but had been inadvertently omitted from the copy signed by the testatrix, and it was held that A. and B. were executors according to the tenor, and entitled to probate. See also *In b. Melville*, 15 P. D. 22; 59 L. J. P. 35.

As to misdescription of executor so that it is doubtful whom the testator meant, see *In b. Brake*, 6 P. D. 217; 50 L. J. P. 48; 45 L. T. 191; *In b. Chappell*, '94, P. 98; 63 L. J. P. 95; 70 L. T. 245.

As to the appointment of a joint stock company as executors, see *In b. Hunt*, '96, P. 288; 66 L. J. P. 8.

Legacies to executors.

I APPOINT —— of &c. and —— of &c. to be trustees and executors of my will And I give to each of them who shall accept the office the sum of £—— as a slight acknowledgment for the trouble he will have in acting under this my will.

Appointment of trustees, executors, and guardians.

I APPOINT —— of —— and —— of —— to be my trustees and executors and together with my wife to be guardians of my children during their respective minorities.

Conditional appointment of son to be trustee and executor.

I DECLARE that if my said son Henry B. shall at the time of my death have attained the age of twenty-one years he shall be a trustee and executor of my will which in that case shall be construed and take effect as if his name had been herein inserted throughout along with and immediately before the names of the said [*trustees*] A. B. and C. D.

Appointment of son to be trustee on attaining twenty-one.

I APPOINT my son William on his attaining the age of twenty-one years to be a trustee of this my will and I direct that my will shall from the time of his acceptance of the trusteeship take effect and be construed as to the property then remaining subject to the trusts hereof in the same manner as if my said son had been originally named a trustee jointly with the said M. and N. And I declare that until the said appointment of my son William shall take effect such appointment shall not fetter or prejudice the exercise of the trusts powers or discretions hereby given to the said M. and N. or the survivor of them or other the trustees or trustee to be from time to time appointed in their or his stead And that if my son William shall die before attaining the age of twenty-one years or if on attaining that age he shall be incapable or unfit or shall refuse or omit to act as a trustee it shall be lawful for but not compulsory on the trustees or trustee for the time being of this my will to appoint a trustee in the place of my son William it being my wish that there shall be from time to time not more than three nor less than two trustees of my will.

I APPOINT my wife [*name*] and —— of &c. and —— of &c. to be trustees and executors of my will But if my wife shall marry again she shall thereupon cease to be trustee and executor of my will which shall thenceforward be construed and take effect and be executed in the same or the like manner as if the said —— and —— [*other trustees*] had been originally appointed the sole trustees and executors. Appointment of wife during widowhood.

I APPOINT my wife [*name*] and my son [*name*] and my brother [*name*] to be executors of my will as to my property and assets which at the time of my death shall be embarked in trade (*e*) And I APPOINT A. B. of &c. C. D. of &c. and E. F. of &c. to be my executors as to all other my personal property. Appointment of special executors; —as to trade

(*e*) See 2 Wms. Exors. 1498, *ante*, p. 358.

I APPOINT A. B. of &c. and C. D. of &c. to be my executors in respect of any debt or debts (*f*) owing to me by my brother [*name*] at the time of my death. —in respect of a debt;

(*f*) The appointment of testator's debtor to be executor destroys the remedy against him at law for the debt. By the appointment of a special executor, as in the text, the legal remedy is vested in him. But the appointment of a debtor to be executor is no more than a parting with the action, and does not operate in equity as a release of the debt as against legatees; *à fortiori*, the debt is assets for the payment of testator's debts. See *Ingle* v. *Richards*, 28 Be. 366, where a debt not recoverable at law (because the debtor was executor) or in equity (because barred by the Statute of Limitations) was held assets in the hands of a proving executor. But as to rebutting any claim in equity by evidence of a continuing intention to forgive a debt due from the person appointed executor, see *Strong* v. *Bird*, L. R. 18 Eq. 315; 43 L. J. Ch. 814; 30 L. T. 745; *In re Applebee*, '91, 3 Ch. 422; 60 L. J. Ch. 793; 65 L. T. 406. Debtor appointed executor;

I APPOINT A. B. of &c. my executor so far as relates to property vested in me as executor and trustee of the will of P. Q. and to continue the representation (*g*) of the said testator And except as aforesaid I appoint C. D. of &c. and E. F. of &c. to be my executors and the trustees of this my will. —to continue representation of prior testator;

(*g*) See sect. 30 of the Conveyancing Act, 1881.

—of mortgage debt, specifically bequeathed;

I BEQUEATH to A. B. of &c. the sum of £—— owing to me on mortgage of freehold hereditaments at —— in the county of —— created by indenture dated the —— day of —— 19— and made between P. Q. of the one part and myself of the other part AND I appoint the said A. B. my executor in respect of the said mortgage debt (*g*).

(*g*) See sect. 30 of the Conveyancing Act, 1881.

—as to leaseholds specifically bequeathed.

I GIVE my leasehold house No. — —— street in the county of —— with the garden and appurtenances thereto belonging or usually enjoyed therewith to my son [*name*] he paying the ground-rent and performing the lessee's covenants in respect of the said leasehold premises and taking the improved rent current at my death without any apportionment thereof And I APPOINT my said son my executor as to the same leasehold premises (*h*) and direct that the costs of and incidental to the obtaining of a limited probate by my said son shall be paid out of my residuary estate and (except as aforesaid) I APPOINT [*names &c.*] to be executors of my will.

Special executor, reason for.

(*h*) This special appointment of an executor is made for the purpose of transferring the liability of the executors for general purposes under the covenants in the lease from the latter, who have simply a fiduciary interest in the leasehold, to the person having the beneficial ownership. See *Lynch* v. *Bellew*, 3 Phillim. 432; *In b. Barnes*, 7 Jur. N. S. 195; and as to executors in or for a particular country, *In b. Wallich*, 3 Sw. & Tr. 423; 33 L. J. P. 87; 9 L. T. 809; *Velho* v. *Leite*, 3 Sw. & Tr. 456; 33 L. J. P. 107. Where a testator gave specific legacies, but did not dispose of his residue, and appointed his daughter executrix for all property not named in the will, probate to the daughter was refused, *In b. Wakeham*, L. R. 2 P. & D. 395; 41 L. J. P. 46; 27 L. T. 214.

Specific bequest of building land,

I BEQUEATH all that piece of building land containing about —— square yards situate in —— street —— in the county of —— which I have agreed to take on a building lease from Mr. —— and all buildings and the wood stone bricks lime and other materials which shall be upon the said piece of land at my death to my son —— absolutely he nevertheless paying the rent and performing the tenant's or lessee's covenants and agreements in respect of the same

piece of land (*i*) and indemnifying my estate therefrom except that the apportioned current rent of the said piece of land down to and inclusive of the day of my death shall be paid out of my residuary estate. I APPOINT my same son my executor as to the premises comprised in the last bequest And as to all other my personal estate I APPOINT —— of &c. and —— of &c. to be my executors.

—and appointment of special executor in respect thereof.

(*i*) In the absence of this direction as to the burthen of the covenants to build, the legatee could (contrary, no doubt, in most cases to the wishes of the testator) require the contract to be performed at the cost of the residuary estate, *Marshall* v. *Holloway*, 5 Sim. 196. But see as to this decision, *Fitzwilliams* v. *Kelly*, 10 Ha. 278; 22 L. J. Ch. 1016.

Covenant to build.

I DIRECT that an anatomical examination be made of my body as soon as possible after my death by two competent surgeons to be selected by my executors and such surgeons shall forthwith deliver a report in writing of the result of such examination to my executors who shall on receipt of such report pay to each of the said surgeons as a remuneration for his trouble a sum of money not exceeding —— guineas (*k*).

Directions as to *post-mortem* examination.

(*k*) By the "Act for regulating Schools of Anatomy" (2 & 3 Will. 4, c. 75), it is enacted (s. 8), "that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorised to examine bodies anatomically to make such examination; and if before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorised and nominated as aforesaid, to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative or any one or more of such person's nearest known relatives being of kin in the same degree, shall require the body to be interred without such examination." And by the 7th section it is made "lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party entrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his lifetime, or verbally in the

Anatomy Act.

Disposal of body after death.

presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

A direction by will as to the disposition of the testator's body cannot be enforced; there is no property in a corpse, but the executors have a right to possession of it, *Williams* v. *Williams*, 20 Ch. D. 659; 51 L. J. Ch. 385; 46 L. T. 275.

Directions as to funeral.

I DIRECT that my body be interred without ostentation at a cost not exceeding £—— in the family vault in the churchyard of the parish church of ——.

I DIRECT that my remains be buried with plainness and privacy in the cemetery of ——.

I DIRECT that [my body be buried in an open or wicker-work coffin and that] the expense of my funeral shall not exceed £——.

Cremation.

I DIRECT that my body be burnt and that my ashes be disposed of as my executors shall think fit (*l*).

(*l*) It is lawful to burn a dead body, but if it be done in such a way as to amount to a public nuisance, this is a misdemeanour. It is also a misdemeanour to burn or otherwise dispose of a dead body with intent to prevent the coroner from holding an inquest on it, in a case where the inquest is one which the coroner has jurisdiction to hold, *Reg.* v. *Price*, 12 Q. B. D. 247; 53 L. J. M. C. 51; *Reg.* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. M. C. 176; 52 L. T. 267.

Provision against lapse.

I GIVE the sum of £—— to A. B. of —— in the county of —— and if he shall die in my lifetime I give the same sum to his executors or administrators as part of his personal estate.

Pecuniary legacy to trustees upon trusts after declared.

I GIVE to my said trustees [*names*] the sum of £—— which is to bear interest after the rate of —— per cent. per annum from the time of my death Upon the trusts and for the purposes hereinafter expressed concerning the same.

Legacy—payable at the end of five years, or

I GIVE to my son —— and my wife the sum of £—— free from legacy duty to be raised and paid at the end of five years from my death (unless my executors shall think fit sooner to

raise the same) together with interest thereon from my death at the rate of —— per centum per annum such interest to be paid by equal half-yearly payments in the meantime Upon and for the trusts and purposes hereinafter expressed concerning the same. sooner at discretion of executors.

I BEQUEATH the pecuniary legacies following namely To my wife the sum of £—— for her immediate use such legacy to be entitled to priority over every other legacy herein bequeathed To each of my other trustees and executors the sum of £—— as an acknowledgment for his trouble in executing the office of trustee and executor of my will To the said [*name*] individually and without reference to his office of trustee and executor the sum of £—— To A. B. of &c. the eldest (*m*) son of R. B. of —— the sum of —— To each of the domestic servants [*or* each of my indoor and outdoor servants not in receipt of weekly or daily wages] who shall be in my service at my death one year's wages (in addition to what may be then due to him or her for wages) and a suit of mourning at the discretion of my executors To &c. [*other pecuniary legacies*] And I direct the legacy hereinbefore bequeathed to my wife to be paid or retained out of the first moneys which shall come to the hands of my executors and the other legacies hereinbefore bequeathed to be paid or retained at the end of twelve calendar months from my decease unless my executors shall think fit sooner to pay or retain the same. Pecuniary legacies; Legacy to servants; —time of payment.

(*m*) In cases of misnomer or misdescription, the general rules are, (1) *Veritas nominis tollit errorem demonstrationis*, and (2) *Nihil facit error nominis cum de personâ constat.* See Broom's Maxims, 475 *et seq.* Thus, by virtue of the first maxim, a bequest to "C. M. S., the legitimate son of C. S.," was held good, though the person named turned out to be illegitimate, *Standen* v. *Standen*, 2 Ves. 589; under a bequest to the Revs. J. B., N. L., and J. D. C. W., described as curates of a particular church of which J. D. C. W. never was curate, J. D. C. W. was held entitled to the legacy to the exclusion of the actual curate, *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800; and a devise to "William G., the eldest son of my nephew John G.," there being two sons of whom William was the younger, passed the lands to William, *Garland* v. *Beverley*, 9 Ch. D. 213; 47 L. J. Ch. 711; 38 L. T. 911. By virtue of the second maxim, a devise to "William P., the eldest Misnomer or misdescription of persons.

Misnomer or misdescription of persons.

son of Charles P.," was held to be a good devise to the eldest son whose name was not William, but Andrew, *Pitcairne* v. *Brase*, Ca. t. Fin. 403; under a devise to "Robert G., the 4th son of George G.," Robert H. G., the 3rd son of George G., was held entitled, *Gillett* v. *Gane*, L. R. 10 Eq. 29; and a bequest to my "housekeeper, Maria R.," took effect in favour of the actual housekeeper, Emma R., *Re Nunn's Trusts*, L. R. 19 Eq. 331; 44 L. J. Ch. 255. See also *Matthews* v. *Greenman*, 31 L. T. 8; *In re Hooper*, 88 L. T. 160. Two residuary legatees were described as E. B. daughter of E. J. B., and V. B. daughter of E. J. B. E. J. B. had only two daughters, one of whom was named V. E. B., and the other had different first names. The two daughters were held to be the residuary legatees, *In re Radcliffe*, 51 W. R. 409. A testator bequeathed a legacy to his "godson, the Hon. H. A. J. P., son of Lord G." His godson was in reality the Hon. R. M. P., another son of Lord G. It was held that the legacy passed to the godson, R. M. P., *In re Blake's Trusts*, '04, 1 Ir. R. 98.

In *Beaumont* v. *Fell*, 2 P. W. 141, though the legatee's christian and surnames were both mistaken, the legacy was held good; but this case was overruled by *Miller* v. *Travers*, 8 Bing. 244; 34 R. R. 703. In *Re Gregson's Trusts*, 2 H. & M. 504; 10 L. T. 642, legacies to persons described only by their surnames were supported.

Mistakes may occur both in the name and the description. A gift to "John N., second son of William S. N., vicar of T.," was held a good gift to John Pryce N., third son of William R. N., vicar of T., *Newbolt* v. *Pryce*, 14 Sim. 354; 65 R. R. 607; and a devise "to Elizabeth A., a natural daughter of E. A., single woman," was held a good devise to John A. the only child of E. A., *Ryall* v. *Hannam*, 10 Be. 536; 16 L. J. Ch. 491; 76 R. R. 201. See also *Drake* v. *Drake*, 8 H. L. C. 172; 29 L. J. Ch. 850; 3 L. T. 193; *Garner* v. *Garner*, 29 Be. 114; 7 L. T. 182; *Re Gregory's Settlement and Will*, 34 Be. 600. In a gift to children, "except Thomas the eldest son," where Thomas was the youngest son, the exception was, by V.-C. Stuart, held void for uncertainty, *Hodgson* v. *Clarke*, 1 Gif. 139; but the decision was reversed on appeal, and it was held that the eldest son, and not Thomas, was to be excepted, 1 D. F. & J. 394; *Blundell* v. *Gladstone*, 1 Ph. 279; *Camoys* v. *Blundell*, 1 H. L. C. 778; 73 R. R. 257. The maxim *veritas nominis tollit errorem demonstrationis* is not inflexible, for if it is clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name; for the rule in question has no other object than to assist in discovering the meaning of the will, and is not applicable where it leads to a construction contrary to the expressed meaning of the testator. See *In re Waller*, 68 L. J. Ch. 526; 80 L. T. 701.

In *Re Stephenson*, '97, 1 Ch. 75; 66 L. J. Ch. 93; 75 L. T. 495, a testator gave the residue of his real and personal estate "unto the

children of the deceased son (named Bamber) of my father's sister, share and share alike." There were three deceased sons of the sister of the testator's father, all named Bamber, and this fact was known to the testator. *Held*, that the gift was void for uncertainty.

A testator bequeathed a sum of money on trust to pay the income to his son Francis for life "and from and after his death to pay such income to his wife Letitia during her life if she shall survive him, and after the death of the survivor of my said son Francis and Letitia his wife" upon the trusts therein contained. The son had resided abroad for many years prior to his death, and had written to his family that he had married Letitia Lilian C.; but it had appeared since the death of the testator, to whom the lady was not known personally, that there had been no legal marriage. It was held that the gift did not fail by reason of the lady, whose identity was established with the *persona designata* "Letitia," not having been legally married to the son of the testator, *Anderson* v. *Berkeley*, '02, 1 Ch. 936; 71 L. J. Ch. 444; 86 L. T. 443.

As to misnomer and misdescription in the appointment of an executor rendering it doubtful whom the testator meant, see *In b. Brake*, 6 P. D. 217; 50 L. J. P. 48; 45 L. T. 191; *In b. Chappell*, '94, P. 98; 63 L. J. P. 95; 70 L. T. 245.

To the interpretation and construction of written instruments in general, the following maxim applies; *Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire.* To which may be added, *In testamentis plenius voluntates testantium interpretantur. Ultima voluntas testatoris est perimplenda secundum veram intentionem suam.* See these rules explained and illustrated in Broom's Legal Maxims, 398—421.

As to contradictions in wills.

In the construction of wills, it is a settled rule that where two clauses or gifts are contradictory and inconsistent, so that they cannot possibly stand together, that clause or gift which comes last, which is nearest in position to the end of the will, shall prevail: *cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est* (Broom's Maxims, 432): the last words are considered to express the latest intention of the testator. But this rule is subject, in its application, to the doctrine that the testator's intent is to be gathered from the general tenor of the will; so that a clause, which cannot be reconciled with the general scheme of the will, may be rejected, whatever the local position it may happen to occupy in the instrument. And the rule is never applied except when a reconciliation of the clauses or gifts is impossible; any construction of the contradictory clauses which will render both effective is preferred to the entire sacrifice of the earlier clause. Thus where a testator has in different parts of the same will given the same land to different persons in fee; even here ingenuity has discovered a conciliatory construction, and the devisees take concurrently as joint tenants. And where a testator bequeathed his residuary personal estate to his two sisters, and afterwards, in the same instrument appointed his wife his residuary legatee,

it was held that the latter gift did not revoke the former, as the second gift might operate on lapsed legacies, *Davis* v. *Bennet*, 30 Be. 226.

See further, on the effect of repugnancy or contradiction in wills Jarm. Wills, Ch. XV., and as to the admission to probate of inconsistent codicils, see *Townsend* v. *Moore*, '05, P. 66; 74 L. J. P. 17; 92 L. T. 335.

Construction of wills where testator mistaken.

It is not sufficient to invalidate a will that the testator at the time of its execution was under a mistake as to the legal effect of a prior instrument with reference to the interest which an intended object of his bounty took under such instrument, *Browning* v. *Budd*, 6 Moo. P. C. 430. Where a testator A. gave all his property to B., stating that, on his (A.'s) death, what he had received from his father C. would devolve, under the will of C., on the nephews (and nearest relations) of A.; whereas the paternal property was, in the events which had happened, part of A.'s estate; it was held that this amounted to an exception of the property in question from the general gift to B., and that it went as in the case of an intestacy, *Circuitt* v. *Perry*, 23 B. 275. Compare *In re Bagot*, '93, 3 Ch. 348; 62 L. J. Ch. 1006; 69 L. T. 399, in which under somewhat similar circumstances, the property was held not to be excepted from the residuary gift.

Legacy to charity.

I GIVE the sum of £—— to the Society for Promoting Christian Knowledge the same to be paid for the purposes of the said society to the Treasurer for the time being thereof whose receipt shall be a good discharge for the same.

I BEQUEATH to the church trustees (*n*) of the parish of —— in the county of —— the sum of £—— Consols to be held by them upon trust to apply the dividends thereon for the following ecclesiastical purposes in the said parish (that is to say):—

I BEQUEATH the sum of £—— Consols to A. B. and C. D. upon trust to apply the same as follows —— And in case church trustees (*n*) for the said parish of —— shall have been appointed either in my lifetime or after my death I empower my trustees to transfer the said sum of Consols to such church trustees to be by them applied for the purposes aforesaid.

Church trustees.

(*n*) See sect. 9 of the Compulsory Church Rate Abolition Act (31 & 32 Vict. c. 109), giving power to appoint a body of church trustees, and incorporating them when appointed. Such a body seem to be the proper recipients of any legacy for ecclesiastical purposes in any parish; but the editor is not aware of any instance in which church trustees have been actually appointed.

I BEQUEATH the sum of £—— to my said trustees [*names*] to be paid or retained at the end of —— calendar months next after my death and to carry interest from my death at the rate of —— per cent. per annum and to be held by my said trustees Upon the trusts and subject to the provisions following that is to say IN TRUST for my younger children the said A. B. C. B. D. B. and E. B. in equal shares but in case any of such younger children being sons shall die under the age of twenty-one years or become an eldest or only son entitled under the provisions hereinafter contained to the possession of my real estate or to the receipt of the rents and profits thereof before he shall have attained that age or in case any of my said younger children being daughters shall die under the age of twenty-one years without having been married with the previous consent in writing of her or their guardian or guardians or become an eldest or only daughter entitled as aforesaid then with or out of the share and accretions under this clause to the share of every child so dying or becoming entitled as aforesaid the sum of £—— shall be added to the share of each other of my said younger children and subject to the making of such additions the share and accretions thereto of every child so dying or becoming entitled as aforesaid shall sink into the residue of my personal estate.

Bequest to trustees, to carry interest, Upon trust for younger children *nominatim*.

On death of any son under twenty-one, or on becoming the eldest son;

or on death of any daughter under twenty-one; out of the share of the children so dying, £—— to be added to the share of each of the other younger children, and the balance to fall into the residue.

I BEQUEATH the several annuities following namely To [*name &c.*] an annuity of £—— To [*name*] the wife of [*name*] an annuity of £—— for her separate use without power of anticipation To &c. [*other annuities*] the said annuities to be payable during the respective lives of the several annuitants in equal half-yearly portions the first of such portions to be paid at the end of six calendar months from my death And as to each or any of the said annuities I empower my trustees to appropriate in their names a fund in two and three-quarters per cent. consolidated stock [*or* in any authorised trust investment or investments] sufficient at the time of appropriation to answer by the dividends [*or* annual income] thereof the payment of the annuity and in the meantime to pay the annuity out of the moneys to

Life annuities;

—time of payment;

—appropriation of funds;

arise from my real and residuary personal estate hereinafter devised and bequeathed but the annuity shall after such appropriation as aforesaid be payable out of the appropriated fund exclusively in exoneration of my other estate and such fund shall subject to the payment of the annuity form part of my residuary personal estate.

—exoneration of residue.

Annuity, bequest of, to valet.

I GIVE to G. A. who now resides at S. in Italy and who formerly lived with me as travelling servant for —— years or thereabouts an annuity of £—— free from legacy duty and all other deductions to be paid to the said G. A. during his life until he shall do or suffer any act or thing whereby the said annuity or any part thereof would but for this provision be assigned charged or incumbered and I direct that the said annuity shall be paid to the said G. A. personally or to such person as he shall from time to time but not by way of anticipation authorise to receive the same by equal half-yearly payments on the —— day of —— and the —— day of —— in every year and that the first half-yearly payment thereof shall be made on such of the said days as shall first happen after my death And I request that my executors will make provision for the punctual payment of the said annuity out of my personal estate periodically as it becomes due to the said G. A. at S. or at such other place as he may happen for the time being to reside in Provided always that it shall be lawful for my executors to accept the bond of the said —— the residuary legatee of my personal estate as sufficient security for the payment of the said annuity and that it shall not be incumbent upon them in that case to appropriate or set apart any fund to answer the same.

Power to accept bond of residuary legatee as a security.

Trust to sink part of residue in a life annuity to be paid to the *cestui que vie* till bankruptcy or alienation.

I DIRECT my trustees as soon as may be after my death to sink the sum of £—— hereinbefore bequeathed to them [*or* one-fifth part of my net residuary estate] in the purchase from any person or persons or from any reputable insurance company in Great Britain of a clear irredeemable annuity to be payable to my trustees during the life of my nephew K. B. of &c. in equal portions half-yearly or quarterly and if not purchased from any insurance company to be well secured

on real or Government securities or other good security in the discretion of my trustees And upon further trust to receive the annuity to be so purchased as last aforesaid as the same shall from time to time become due and if my said nephew shall not at my death be an undischarged bankrupt to pay the same into the hands of my said nephew until he shall become bankrupt or shall do or suffer some act or thing whereby the said annuity shall be wholly or partially assigned charged or incumbered (*o*) And on and after the bankruptcy or doing or suffering of any such act or thing as aforesaid then the said annuity shall cease to be payable to my said nephew and shall be held by my trustees upon the trusts following &c.

Forfeiture.

(*o*) See *Re Muggeridge's Trusts*, Joh. 625; 29 L. J. Ch. 288; 1 L. T. 436, as to the effect of insolvency before the annuity was actually payable; and *Dorsett* v. *Dorsett*, 30 Be. 256; 31 L. J. Ch. 122, in which case it was held that a clause of forfeiture on bankruptcy affected a share which accrued after the bankrupt had attained his certificate, as well as his original share, and that the effect was to accelerate the interests in both shares of those persons claiming by reason of the forfeiture. Liquidation under the Bankruptcy Act, 1869, worked a forfeiture, *Re Amherst's Trusts*, L. R. 13 Eq. 464; 41 L. J. Ch. 222; 25 L. T. 870; *Re Akcroyd's Settlement*, '93, 3 Ch. 363; 63 L. J. Ch. 32; 69 L. T. 474. See also *White* v. *Chitty*, L. R. 1 Eq. 372; 35 L. J. Ch. 343; 13 L. T. 750; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Cox* v. *Fonblanque*, L. R. 6 Eq. 482; 37 L. J. Ch. 622; *Trappes* v. *Meredith*, L. R. 7 Ch. 248; 39 L. J. Ch. 366; 21 L. T. 782; *Re Parnham's Trusts*, L. R. 13 Eq. 413; 41 L. J. Ch. 292; *Billson* v. *Crofts*, L. R. 15 Eq. 314; 42 L. J. Ch. 531; *Re Throckmorton*, 7 Ch. D. 145; 47 L. J. Bk. 62; 37 L. T. 447; *Ancona* v. *Waddell*, 10 Ch. D. 157; 48 L. J. Ch. 115; 10 L. T. 31; *Samuel* v. *Samuel*, 12 Ch. D. 152; 47 L. J. Ch. 716; *Nixon* v. *Verry*, 29 Ch. D. 196; 54 L. J. Ch. 736; *Robertson* v. *Richardson*, 30 Ch. D. 623; 55 L. J. Ch. 275; *Metcalfe* v. *Metcalfe*, '91, 3 Ch. 1; 60 L. J. Ch. 647; 65 L. T. 426; *Blackman* v. *Fysh*, '92, 3 Ch. 209; 60 L. J. Ch. 666; 64 L. T. 590; *Re Loftus-Otway*, '95, 2 Ch. 235; 64 L. J. Ch. 529; 72 L. T. 656; *Re Sampson*, '96, 1 Ch. 630; 65 L. J. Ch. 406; 74 L. T. 246; *In re Greenwood*, '01, 1 Ch. 887; 70 L. J. Ch. 326; 84 L. T. 118; *In re Cotgrave*, '03, 2 Ch. 705; 72 L. J. Ch. 777; 89 L. T. 433; *In re Baker*, '04, 1 Ch. 157; 73 L. J. Ch. 172; 89 L. T. 742; *In re Chapman*, '04, 1 Ch. 431; 73 L. J. Ch. 291; 90 L. T. 339; *Durran* v. *Durran*, 91 L. T. 187.

As to the effect of foreign or colonial bankruptcies, see *Re Blithman*, L. R. 2 Eq. 23; 35 L. J. Ch. 255; *Re Hayward*, '97, 1 Ch. 905; 66 L. J. Ch. 392; 76 L. T. 383.

In *Adams* v. *Adams*, '92, 1 Ch. 369; 61 L. J. Ch. 237; 66 L. T. 98, the forfeiture clause provided that if the legatee should attempt to interfere in the management of the testator's estate, his annuity should be thereby forfeited. The annuitant commenced an action against the trustees of the estate out of which his annuity was payable, alleging non-payment of his annuity, waste of the estate and other charges, all of which charges he failed to establish. The action was held to be frivolous and an attempt to interfere in the management, and the annuitant was declared to have forfeited his annuity. See *In re Porter*, '92, 3 Ch. 481; 61 L. J. Ch. 688. For a case where a reversionary interest was given over in the event of the legatee being under "legal disability" to take the same for his own benefit at the death of the tenant for life, see *Re Carew*, '96, 2 Ch. 311; 65 L. J. Ch. 686; 74 L. T. 501.

Where the clause provides for forfeiture on the legatee's "anticipating," and the legatee executes a deed by which he attempts to anticipate, but which proves inoperative, the forfeiture will not take effect, as "anticipating" will not be read as meaning "attempting to anticipate," *In re Wormald*, 43 Ch. D. 630; 59 L. J. Ch. 404; 62 L. T. 423. If the clause provides for forfeiture on alienation, or attempted alienation, a covenant in the marriage settlement of the legatee to settle any moneys coming to him under the will does not work a forfeiture, *In re Crawshay*, '91, 3 Ch. 176; 60 L. J. Ch. 583; 65 L. T. 72; and see *In re Allnutt*, 22 Ch. D. 275; 52 L. J. Ch. 299; 48 L. T. 155; *Brooks* v. *Keith*, 1 Dr. & Sm. 462; 4 L. T. 541.

A document of charge which, as between the person giving it and the person to whom it is given, is voidable, or liable to be set aside by the Court, and is avoided or set aside accordingly, will not operate as a forfeiture, *Re Sheward*, '93, 3 Ch. 502; 69 L. T. 302.

Charge of legacy on specific real estate, with provision for discharge thereof.

I CHARGE the said sum of £—— in aid of my personal estate (*p*) upon my freehold estates at —— And I declare that upon the investment by the trustees or trustee for the time being of this my will of the said sum of £—— in or upon any authorised trust investment or investments my said personal estate and the said estates at —— shall thenceforth be liberated from all and every trust charge and liability in respect of the said sum of £—— and all interest thereon And I declare that the production or other proof of the execution by the trustees or trustee of this my will of a deed declaring that such sum has been invested pursuant to the directions of this my will and the trusts upon which they or he held the same sum at the time of the investment thereof or a recital to the same effect in any deed executed by the trustees or trustee for the time being of this my will

shall in favour of purchasers or mortgagees of the hereditaments so charged in aid of my personalty with the said sum of £—— be conclusive evidence of the due investment thereof and shall exonerate such purchasers or mortgagees therefrom and from all liability in respect of the insufficiency of the said investment and securities and from seeing to the application of the same sum and from inquiring into or taking notice of the misapplication thereof or of any part thereof.

Charge of legacies on real estate.

(*p*) A mere charge of debts or legacies upon the realty, or a charge upon the realty in aid of the personalty, does not alter the order and priority in which the different kinds of property are liable for the satisfaction of the debts or legacies, Jarm. Wills, Ch. XLVI. There must appear in the will not merely the intention to charge the realty, but also a clear intention to exonerate the personalty, before the primary liability is transferred from the latter to the former. If a testator by deed conveys real and personal property to trustees on trust after his death to pay his debts and funeral expenses, and after reciting the deed in his will devises and bequeaths the residue of his real and personal estate not included in the deed, the charge of debts in the deed is not enough to shift the primary liability from the testator's general personal estate, but the charge of debts on the personal property included in the deed is enough to fasten the primary liability on this part of the personalty, *Trott* v. *Buchanan*, 28 Ch. D. 446; 54 L. J. Ch. 678; 52 L. T. 248.

And a general charge of annuities and legacies upon all the testator's real and personal estate (and therefore in terms including estates devised specifically) will not alone be sufficient to bring the specifically devised estates within the scope of the charge, *Conron* v. *Conron*, 7 H. L. C. 168. But see *In re Emmerton*, 3 D. J. & S. 338; *Lord Portarlington* v. *Damer*, 4 D. J. & S. 161; *Mannox* v. *Greener*, L. R. 14 Eq. 456; 27 L. T. 408.

As to the implied charge of legacies upon the real estate created by a residuary devise following bequests of legacies, see *Greville* v. *Browne*, 7 H. L. C. 689; *Hassel* v. *Hassel*, 2 Dick, 527; *Re Bawden*, '94, 1 Ch. 693; 63 L. J. Ch. 412; 70 L. T. 526; *Re Boards*, '95, 1 Ch. 499; 64 L. J. Ch. 305; 72 L. T. 220.

*Corpus* of estate at wife's disposal;

I DEVISE and bequeath all my real and personal estate to such persons for such estates or interests and in such manner as my wife shall from time to time by deed or writing under her hand or by will or codicil appoint or as to chattels passing by delivery to whom my wife shall deliver the same by way of gift or otherwise And in default of any such appointment

—in default, to her for life; with gift over.

or delivery To my wife during her life And after her death as to such parts of my real and personal estate as she shall not have disposed of as aforesaid I devise and bequeath the same as follows—

Separate estate of married woman—special directions as to payments through a banker or agent.

I DECLARE that notwithstanding the trusts hereinbefore contained of the annual income of the said sum of £—— and the investments thereof for the separate use of my said daughter Caroline it shall be lawful for my trustees so long as they shall deem it expedient so to do to pay or remit the annual income of the said sum of £—— and the investments thereof to such banker or agent as my said daughter shall from time to time appoint or to authorise such banker or agent to receive the same for the purpose of remittance or payment as my said daughter shall direct and every payment or remittance which shall be made by my trustees to or through the agency of a banker or agent appointed by my said daughter shall until such appointment be withdrawn by her be a good discharge to my trustees for the money which shall be so paid but this provision shall not preclude my trustees from requiring from time to time as the said annual income shall arise a special direction from my said daughter respecting the application thereof or otherwise from paying the same into her proper hands if my trustees shall deem it advisable so to do (*q*).

(*q*) This clause is framed to remove the doubt whether a trustee is justified in remitting income through a banker or agent to a married woman permanently resident abroad.

Trinkets, &c., to wife.

I GIVE to my wife [*name*] all the trinkets jewellery paraphernalia and ornaments of her person which shall have been used by her previous to my death And as to

Paintings, &c., as heirlooms.

my gold and silver plate and my collection of paintings in oil I desire that the same may go and be enjoyed as heirlooms with the freehold estates comprised in my marriage settlement.

Wife to have the use of household furniture, &c.;

I BEQUEATH to my wife the personal use and enjoyment in her residence for the time being so long as she shall continue my widow and shall reside in England of all my

household furniture plate linen china glass books pictures prints musical instruments and other effects of a like nature which shall at my death be in or about my then dwelling-house And I direct my executors (other than my wife) to deliver the same to her within one calendar month next after my death on her signing an inventory thereof to be prepared and kept by my other executors who shall at the same time deliver to her a duplicate of such inventory signed by them And I empower my said other executors by writing under their hands to determine in case of dispute what articles shall be considered as included in the bequest lastly hereinbefore contained and I exonerate them from all responsibility in respect of the effects included in the same bequest after such delivery thereof as aforesaid until they shall receive actual notice that my wife is dead or has married again or is resident out of England.

—delivery and inventory;

—power to determine questions.

I AUTHORISE my executors to dispose by way of gift or otherwise to such persons and in such manner as they shall think fit of my wearing apparel and any other articles of personal or household use or ornament not exceeding £—— each in value which they may for any reason think it unadvisable to sell.

Power to executors to give away articles of small value.

I DECLARE that it shall be lawful for my executors to permit my wife to take at a valuation to be made in such manner as my executors shall think fit all or any part of the furniture plate linen china glass printed books pictures prints musical instruments and other effects of a like nature of which I shall die possessed and to accept such bond or promissory note of hand or other personal security for the payment of the amount of such valuation either with or without interest by such instalments and at such time or times and in such manner as my executors shall think fit without incurring any responsibility by reason thereof.

Furniture.

Power to executors to sell to wife, and to accept security for purchase-money.

I GIVE all my household furniture and all my plate linen pictures and books to my said trustees [*names*] UPON TRUST to permit my wife to have the personal use and enjoyment

Bequest of furniture, plate, &c., to trustees upon

trust for wife for life—

to sell—and divide proceeds amongst children.

Proviso, allowing division *in specie*.

thereof during her life and after her death UPON TRUST to sell and convert the same into money and pay or divide the clear money arising therefrom to or amongst such of my children as shall be living at the death of my wife and if more than one in equal shares PROVIDED nevertheless that if at the death of my wife such of my children as shall be then living or the major part of them shall have attained the age of twenty-one years and shall signify to my trustees the desire of such children or the major part of them that my said furniture plate and other articles hereinbefore bequeathed shall not be sold but shall be divided *in specie* then the same shall be accordingly divided by my trustees into as many shares as there are children of mine living at the death of my wife such shares to be as nearly of equal value as may be and such children shall have preference in the choice of shares according to priority of birth and all differences which shall arise respecting the division of such furniture and other articles shall be determined by my trustees whose decision shall be final AND I DIRECT my trustees to take an inventory of my said furniture plate and other articles and deliver to my wife a copy thereof and to retain in their hands another copy.

Inventory.

Bequest to trustees of plate, &c., for unmarried children equally, with survivorship.

I BEQUEATH all my plate [&c.] unto the said —— and—— Upon trust to divide the same amongst such of my children as shall not at my death be or have been married in shares and proportions as nearly equal in value as may be such division to be made by my trustees according to the best of their judgment and if any of such children shall die under the age of twenty-one years then (*r*) the share or shares as well accruing as original of the child or children so dying shall belong to the others or other of such children to be divided between them if more than one in manner aforesaid.

Word "then."

(*r*) The word "*then*," as commonly interposed between two limitations, is a particle of inference connecting the consequences with the premises, and meaning "In that event," or "If that happens:" it is therefore, in those cases, a word of reasoning rather than of time, Jarm. Wills, 1335. But in *Gill* v. *Barrett*, 29 Be. 372, the word "*then*," used twice in the same sentence in a will, was construed in the first instance

as pointing to the event, and in the second as an adverb of time. And see *Wharton* v. *Barker*, 4 K. & J. 483.

Specific legacies;

I BEQUEATH the specific legacies following namely To my wife all the wines liquors fuel housekeeping provisions and other consumable stores which shall at my death be in or about my then dwelling-house To my son [*name*] my gold watch with its appendages To &c. [*other specific legacies*] AND I DIRECT the specific legacy hereinbefore bequeathed to my wife to be delivered immediately after my death and the several other specific legacies hereinbefore bequeathed to be delivered within one calendar month after my death AND I DIRECT the legacy duty on and all the expenses incident to the aforesaid bequests (as well specific as pecuniary) and annuities to be paid by my trustees and executors out of the moneys to arise from the sale and conversion of my residuary estate.

—time of delivery.

Legacy duty and expenses.

Conditional bequest.

WHEREAS my son John owes me the sum of —— on mortgage of —— &c. Now in case my said son John shall within eighteen calendar months from the day of my death assure the hereditaments comprised in the said mortgage to the uses for the purposes and subject to the powers and provisions of the settlement executed in contemplation of his marriage with his present wife concerning the real estate therein comprised or such of them as shall be then subsisting or capable of taking effect I DIRECT my executors to release the same hereditaments from the said sum of £—— and all interest and arrears of interest which may be owing thereon down to and including the day of the execution of the said assurance But if my said son shall for the said period of eighteen calendar months refuse neglect or omit to settle the said mortgaged hereditaments in manner aforesaid then I direct my executors to recover the said sum of £—— and the interest thereof or to foreclose the equity of redemption of the same hereditaments And if the said sum of £—— or any part thereof shall be recovered I direct my executors to invest the same in the purchase of freehold or copyhold messuages or lands of inheritance in possession and to assure the hereditaments so purchased or foreclosed

(as the case may be) to the uses for the purposes and subject to the powers and provisions of the said marriage settlement concerning the real estate therein comprised or such of them as shall be then subsisting or capable of taking effect.

Bequest to wife on condition that she gives a bond to executors to pay £—— within six months after her death.

I DECLARE that the bequests to my wife herein contained are given on condition that she shall within six calendar months after my death execute and give a bond under her hand and seal to the trustees or trustee for the time being of this my will in a sufficient penalty conditioned for the payment unto such obligees or obligee their or his executors administrators or assigns by the executors or administrators of my wife within six calendar months after her death of the sum of £—— to be held upon the trusts herein declared or referred to of and concerning the same.

Legacy to debtor of debt secured by mortgage.

I FORGIVE —— of &c. the sum of £—— which he owes me on mortgage of his Dale Estate in the county of W. and all interest and arrears of interest thereon down to and including the day of my death And I appoint the said —— my executor so far as relates to the said debt and devise the said Dale Estate unto the said —— his heirs and assigns discharged from the said mortgage.

Legacy to debtor;

I FORGIVE A. B. of &c. the debt of £—— which he owes me or so much thereof as shall be owing at my death (*s*) and all interest and arrears of interest thereon down to and including the day of my death [*or* and the interest thereon not exceeding one year's interest in case so much shall be owing at my death] and I DIRECT my executors to cancel and deliver to the said A. B. the bond by which the said sum of £—— and interest are secured AND in case the said A. B. shall die in my lifetime this bequest shall take effect in favour of the executors or administrators of the said A. B. for the benefit of his estate and my executors shall cancel and deliver the said bond to his executors or administrators.

—provision against lapse.

Legacy to debtor; release of debt.

(*s*) In *Eden* v. *Smyth*, 5 Ves. 341; 5 R. R. 60, a legatee was held entitled to his legacy discharged from debts owing by him to the testator upon evidence from the testator's accounts and unattested memoranda in his writing. But see *Chester* v. *Urwick*, 23 Be. 404, as to the effect

of such memoranda in releasing a debt. A person who owes money to an estate, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass, without first making the contribution which completes it. If the debt is barred by statute, still the principle applies, *Cherry* v. *Boultbee*, 4 My. & Cr. 442; 9 L. J. Ch. 118; *Courtenay* v. *Williams*, 3 Ha. 539; 15 L. J. Ch. 204; *In re Akerman*, '91, 3 Ch. 212; 61 L. J. Ch. 34; 65 L. T. 194. If the testator intends to forgive the statute-barred debts this should be made to appear clearly.

Legacy of shares; directions as to calls.

I GIVE to —— of &c. the shares which may belong to me at the time of my death in the several companies mentioned in the schedule (*t*) to this my will I DECLARE that the dividends thereon accruing at the time of my death shall not be apportioned as between the said —— and my executors and that the said —— shall have the benefit of any calls paid by me in respect of the said shares in anticipation and that if any calls thereon shall be due and unpaid at the time of my death the same with all interest thereon shall be paid by my executors out of my general residuary estate I further declare that the said —— shall be liable to pay all calls falling due after the day of my death in respect of the said several shares and shall exonerate my estate therefrom.

Schedules.

(*t*) Schedules, as they relieve the body of the will from such matter which interferes with the continuity of the instrument, may often be adopted with advantage in the preparation of wills. But care should be taken that the signature of the testator is underneath or follows the schedules.

Stock legacy.

I GIVE to —— of &c. the sum of £—— Two Pounds Ten Shillings per Cent. Annuities now standing in my name in the books of the Governor and Company of the Bank of England And in case I shall not have any such stock or stock to that amount standing in my name at the time of my death I DIRECT my executors out of my personal estate to purchase in the name of the said [*legatee*] the sum of £—— like annuities or so much of the same annuities (as the case may be) as will make up that sum which I hereby give to the said [*legatee*].

Specific legacy; stock.

I GIVE to —— of &c. as a specific legacy the sum of £—— Two and Three quarters per Cent. Annuities now standing

in my name in the books of the Governor and Company of the Bank of England (*u*) together with any dividends thereon whether in arrear or accruing due at the time of my death.

Ademption.

(*u*) As to the liability of these legacies to ademption, and the consequent loss by the legatees of all benefit, see 2 Wms. Exors. 1061 *et seq.* As to the circumstances which constitute ademption of specific legacies of choses in action, see *Jones* v. *Southall*, 32 Be. 31; 32 L. J. Ch. 130; 8 L. T. 103. And see *Harrison* v. *Jackson*, 7 Ch. D. 339; 47 L. J. Ch. 142; *Manton* v. *Tabois*, 30 Ch. D. 92; 54 L. J. Ch. 1008; 53 L. T. 289, disapproving *Le Grice* v. *Finch*, 3 Mer. 50; 17 R. R. 10; *Clark* v. *Browne*, 2 S. & G. 524; 97 R. R. 317; and *In re Vickers*, 81 L. T. 719. A testator made a specific bequest of stock, and he having become lunatic, the stock was sold under an order in the lunacy; the bequest was adeemed, *Freer* v. *Freer*, 22 Ch. D. 622; 52 L. J. Ch. 301.

Shares.

I GIVE to —— of &c. as a specific legacy my twenty shares numbered 10—29 both inclusive in the —— Life Assurance Company (*x*) and I declare that the dividends thereon current at the time of my death shall not be apportioned but shall belong wholly to the said ——.

(*x*) See note (*u*), above.

Solicitor's books, drafts, and papers.

I GIVE to my son —— all my law books books of account and business drafts papers and documents and the safes boxes cupboards and bookcases in which they shall be deposited at my death subject nevertheless as to the said business drafts papers and documents to the paramount right of any person or persons to order and direct the disposition thereof respectively.

Bequest of share in brewery.

I GIVE unto my said son —— all my share and interest in the brewery and premises situate at —— aforesaid carried on by him in his own name alone but in fact in partnership with me and in the plant (*y*) machinery fixtures utensils stock book-debts goodwill and effects connected therewith but this bequest is not to include any public-houses or other property separate and distinct from the said brewery though held by my said son and myself in connection therewith.

Plant. Goodwill.

(*y*) As to the word "plant," see *Wood* v. *Gaynon*, 1 Amb. 394; as to what is comprised in a bequest of "the plant and goodwill" of a

business, *Blake* v. *Shaw*, Joh. 732. As to what is included in "all my share and interest" in the business of a solicitor, see *In re Barfield*, 84 L. T. 28.

Bequest of share in partnership concern.

I GIVE my share in the business of —— carried on by me in partnership with —— to my said trustees [*names*] UPON TRUST to continue and carry on the same until the determination of the partnership term by effluxion of time or otherwise and I DIRECT that the profits and proceeds of the said share shall be applied by my trustees as part of the annual income of my residuary personal estate and I FURTHER DIRECT that on the determination of the said term by effluxion of time or otherwise my share in the said partnership property and effects and the goodwill thereof shall be assigned to my eldest son John in consideration that he shall thereupon pay to my trustees such a sum of money as shall then be the excess of the value thereof (to be ascertained as hereinafter mentioned) above the sum of £5,000 with interest on such excess at the rate of 5 per cent. per annum computed from the determination of the said term And I DIRECT that the value of my said share shall be determined by the award of three disinterested persons or of any two of them one of such persons to be chosen by my trustees other than my eldest son one other of them by my eldest son and the third by such two persons so chosen And that in determining such value nothing shall be charged for the goodwill of the said business And I direct that the sum of money to be paid by my eldest son as aforesaid shall be applicable as part of my residuary personal estate.

Valuation.

Goodwill.

Provision in case of bankruptcy of legatee.

I BEQUEATH the sum of £—— to my trustees on trust to invest the same and to pay the income of such investments to A. B. until he shall become a bankrupt or shall do or suffer any act or thing whereby the said annual income or his interest therein or any part thereof would or might but for this provision be charged or incumbered or become vested in (*z*) any other person or persons and I DIRECT that my trustees shall during the residue of the life of the said A. B. apply the said income for or towards the maintenance of the children of the said A. B. AND in case there shall

not be any such child then in existence then I direct my trustees to apply the said income equally between C. D. E. F. and G. H. or such of them as shall be living at the determination of the said trust in favour of A. B. and in case they shall all be dead I bequeath the said investment to Y. Z. absolutely.

(z) Where the words were "would become payable to or vested in some other person" it was held that on a receiving order being made against the legatee, though his income would not vest in the official receiver, still, as it would become payable to the latter if it had belonged absolutely to the legatee, the clause for cesser of the legatee's interest took effect, *In re Sartoris's Estate*, '92, 1 Ch. 11; 61 L. J. Ch. 1; 65 L. T. 544.

Trusts of pecuniary legacy:

—to invest;

—to pay income to niece for life; restrained from anticipation.

I DIRECT my trustees to invest the said sum of £—— and to stand possessed of the said sum and the securities for the same (hereinafter referred to as the said trust fund) upon the trusts following namely UPON TRUST to pay the annual income arising therefrom unto my niece C. C. the wife of T. C. of &c. during her life for her separate use and without power of anticipation And after her death in case she shall by her will so direct Upon trust to pay the whole or any part of such annual income unto her present or any other husband whom she may leave surviving her during his life or for any shorter period And subject as aforesaid as to as well the capital as the annual income of the said trust fund

—subject as above,

—for children equally.

UPON TRUST for all the children of my said niece who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or be married and if more than one in equal shares AND in case there shall not be any such child then I direct that the said trust fund or so much thereof as shall not have been applied for maintenance shall form part of the residue of my estate.

If no child, to form part of the residue.

Testamentary appointment of trust funds in execution of a power contained in a former will.

WHEREAS under the will of my late wife M. or otherwise I have in the event of there not being any child of mine by her living to acquire the absolute vested interest in certain trust-moneys or property comprised in the settlement made in contemplation of my marriage with her a power of disposing of such trust-moneys or property in such manner as

I may think proper Now I DO HEREBY in execution of all powers and authorities enabling me in this behalf appoint and bequeath all trust-moneys and funds over which I have or eventually may have by virtue of the same will or otherwise any power of appointment or disposition to the said [*trustees*] Upon the same or the like trusts and subject to the same or the like provisions and declarations as are hereinbefore expressed and declared concerning my residuary personal estate or as near thereto as may be.

Appointment to children.

IN EXERCISE of the power of appointment amongst my children (*a*) by my late wife Mary reserved to or vested in me by the settlement executed in contemplation of my marriage with her I hereby bequeath the sum of £—— comprised in the same settlement to my four daughters Mary B. Jane B. Sarah B. and Elizabeth B. in equal shares (*b*).

(*a*) A power to appoint to children absolutely is well exercised by giving a child a life interest, with power to appoint by will only, *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch. 205; 31 L. T. 712.

Illusory appointments.

(*b*) Formerly, where a person had a power of appointing property, real or personal, amongst a class (and such power was not an exclusive power), although the donee had a full discretion as to the amount of the shares of the respective objects, and although any appointment that included all the objects was valid at law, yet if the donee exercised the power by appointing to one or more a nominal share, or what was not (having regard to the amount to be distributed), considered a substantial share, equity interfered and set aside the appointment as illusory. The old doctrine applied to appointments made before the 16th July, 1830, see the Appendix to Sugd. Pow. 938; and the notes to *Aleyn* v. *Belchier*, in 1 Wh. & Tud. L. C. Eq. The difficulty was to determine what in each case constituted a substantial share, and the rule of equity produced so much inconvenience and litigation, that by 1 Will. 4, c. 46, commonly known as Preston's Act, but for which Lord St. Leonards was responsible (see Sugd. Pow. 449; 30 Be. 394) illusory appointments were made valid in equity as well as at law, notwithstanding that any one or more of the objects take only a nominal share. But if the appointor omitted to appoint something—a shilling, or a farthing—to every object of the non-exclusive power, the appointment failed, see *Bulteel* v. *Plummer*, L. R. 6 Ch. 160; 23 L. T. 753; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405; 43 L. J. Ch. 403; 30 L. T. 283; though an appointment amongst all the objects "and the survivors and survivor of them" was valid, *Re Capon's Trusts*, 10 Ch. D. 484; 48 L. J. Ch. 355. A further amendment of the law was required, making every power of appointment

1 Will. 4, c. 46, Preston's Act.

37 & 38 Vict. c. 37.

an exclusive power unless the donor of the power prescribes a minimum share which each or any object is to have, and this was effected by 37 & 38 Vict. c. 37, which applies to appointments made after the 30th July, 1874, though the power was created before the Act.

Devise to children in fee, with cross executory limitations in fee.

I DEVISE all &c. TO THE USE of my children if more than one equally or my child if only one wholly in fee simple With cross limitations of the shares original and accruing of each of the children dying under the age of twenty-one years without leaving issue living at his or her death To the use of the others equally or the other wholly of the said children in fee simple.

Specific devise and bequest of freeholds and leaseholds;

I DEVISE and bequeath unto my said trustees [*names*] ALL that my freehold estate situate &c. AND ALL that piece of land held by me for the residue of a term of ninety-nine years granted by the late —— and being part of a tract of land called —— (but subject as to —— acres part thereof to a lease dated &c. granted ——) TO HOLD the said freehold and leasehold premises (*c*) unto and to the use of my said trustees

Subject to a charge.

their heirs executors and administrators respectively but subject to and charged exclusively in exoneration of my other estate with the payment by my said eldest son of the sum of £—— and interest for the same at the rate of four per cent. per annum computed from my death the first payment thereof to be made on the expiration of six calendar months next after my death And I direct that in case my said eldest son his executors administrators or assigns shall pay such interest as last mentioned by equal half-yearly payments on or within thirty days next after the said half-yearly days respectively then and in such case my trustees shall not require payment of the said sum of £—— until the —— day of —— AND I direct that the said sum of £—— and the interest thereof shall be applied by my said trustees as part of my residuary personal estate AND subject to and charged with the said sum of £—— and the interest thereof I direct that the said freehold and leasehold premises shall be held by my trustees

Upon trust for issue of son as he shall appoint;

upon the trusts following that is to say UPON SUCH TRUSTS for such estates or interests and in such manner in all respects as my said eldest son shall by deed or will appoint so only that

every such appointment be made in favour of some one or more of his children or other issue born in his lifetime And in default of and until such appointment UPON TRUST to pay the rents and annual proceeds thereof unto my said eldest son during his life And after his death as to the same freehold and leasehold premises respectively subject as aforesaid UPON TRUST for the child if only one or all the children equally if more than one of my said eldest son who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be previously married but no child of my said eldest son in favour of whom or of any of whose issue an appointment shall be made under the power aforesaid shall participate under the trust last hereinbefore contained in the unappointed part of the said freehold and leasehold premises without bringing the benefit of such appointment into hotchpot AND in case there shall not be any child or other issue of my said eldest son who shall attain a vested interest under the powers or trusts aforesaid then I DIRECT that subject to the power for advancement hereinafter contained the said freehold and leasehold premises shall go and be considered as part of my residuary estate and be held upon the trusts thereof.

—to son, for life;

—his children;

—hotchpot.

(*c*) Where a testator makes several bequests to a devisee, one of which is clogged with a burden created by the testator, it is a question of intention, to be gathered from the will, whether the devisee must elect to take all or none of the gifts, or whether he may accept the beneficial gifts, and repudiate the burdensome one. Thus, where A. bequeathed a legacy to B., devised freeholds to B. and his wife for life with remainder over, and after various intervening gifts bequeathed leaseholds to B., it was held that B. might accept the legacy and freeholds, and repudiate the burdensome bequest of the leaseholds, *Warren* v. *Rudall*, 1 J. & H. 1; 29 L. J. Ch. 543; *Long* v. *Kent*, 6 N. R. 354; 12 L. T. 794.

Election bequest *cum onere*.

I DEVISE and bequeath all my leases for lives of any lead or other mines or minerals and all contracts and agreements respecting any lead or other mines or minerals and all my personal estate not hereinbefore otherwise disposed of to my son or other descendant who shall first within the period of twenty-one years after my death be of the age of twenty-one years and entitled to the said hereditaments and premises

Bequest of leaseholds and personalty to first son, &c., entitled to the possession of settled freehold estate.

comprised in the said settlement in remainder or reversion immediately expectant on the determination of the said term of 500 years.

Devise of real estate to trustees; to permit wife to occupy house during her widowhood;

I DEVISE all &c. —— unto and to the use of —— of &c. in fee simple upon the trusts following (that is to say) UPON TRUST to permit my wife [*name*] if she shall continue my widow and such of my daughters as shall from time to time be spinsters to have the personal use occupation and enjoyment as long as they or any one or more of them shall think fit personally to dwell in the same (*d*) of the messuage or tenement now in the occupation of B. with the gig-house and room over the same together with the washhouse [&c.] and the garden behind the said messuage together with the free use of the pump and water in the yard of my present dwelling-house and with liberty to pass and repass to and from the said messuage and premises the use and enjoyment whereof is hereinbefore given to them through over and along the yard of my said present dwelling-house to and from the public road or street now called —— street my said wife and daughters or such of them as shall so use occupy and enjoy the said premises maintaining and keeping the same during such their or her use occupation and enjoyment thereof in good tenantable repair and condition to the satisfaction of the trustees or trustee for the time being of this my will AND as to all the said hereditaments and premises hereinbefore devised subject and without prejudice as to part thereof to the trusts hereinbefore contained in favour of my said wife and daughters UPON TRUST during the minority of my son W. B., to let the same for any term or terms not exceeding —— years at the best yearly rent or rents and to receive the rents issues and profits of the same hereditaments, and premises and thereout in the first place to pay and satisfy all the costs charges and expenses of insuring the same against loss or damage by fire and of maintaining and keeping the same in good tenantable repair and condition and all other incidental outgoings and expenses and in the next place to apply such annual sum or sums as my trustees or trustee for the time being shall think expedient in or towards the maintenance

—to let and manage, during the minority of son.

and education or otherwise for the benefit of my said son W. B. in such manner as my said trustees or trustee shall judge most beneficial and to dispose of the residue or surplus (if any) of the same rents issues and profits as part of my residuary personal estate And subject thereto upon trust for my said son W. B. his heirs and assigns.

Use and occupation.

(*d*) A devise of the "use and occupation" of land does not usually necessitate personal use and occupation, but authorises a letting of the land, *Rabbeth* v. *Squire*, 4 De G. & J. 406; 28 L. J. Ch. 565. But the more limited construction may be required by the context, *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Parker* v. *Parker*, 1 N. R. 508.

Again, where a testator gave his pictures to trustees upon trust to permit a certain person to have the "use and enjoyment" thereof during her life, and that person had some of the pictures in a flat which she let furnished for a short time, it was held that she was entitled to let the pictures together with her flat, and was not restricted to personal enjoyment, *In re Williamson*, 94 L. T. 813.

Devise to uses in strict settlement.

To the use of my eldest son [*name*] and of every other son of mine and their respective issue male so that every elder son and his issue male be preferred to and take before every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession and according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an estate in tail male.

Limitation for life, remainder to the first and other sons of life-tenant in tail, remainder to his daughters as tenants in common in tail, with cross-remainders between them.

To the use of A. B. and his assigns during his life without impeachment of waste And immediately after the death of the said A. B. or the determination in his lifetime of the estate hereinbefore limited to him To the use of the first and every other son successively of the said A. B. in remainder one after another and the heirs of the body of each such son every elder son and the heirs of his body taking before every younger son and the heirs of his body And on failure of such issue To the use of the daughter of the said A. B. if only one or all the daughters of the said

A. B. if more than one to take in equal shares as tenants in common and the heirs of the body or respective bodies of such daughter or daughters And on failure of the issue of each of the said daughters as to as well the share hereinbefore limited to her as the share or shares limited to her by this limitation of cross-remainders To the use of the other if only one or the others if more than one of the said daughters and if more than one to take as aforesaid and the heirs of her or their body or respective bodies And on failure of such issue To the use of the said A. B. his heirs and assigns for ever.

Equitable limitations to a son *in esse* and every after-born son of the testator for life, with legal remainders to the heirs in tail of each such son, and a proviso determining the life interest on bankruptcy or alienation.

To the use of the said A. and B. their executors and administrators during the life of my son C. Upon trust to permit the said C. and his assigns to receive the rents and profits of the said hereditaments during his life subject to the proviso hereinafter contained And immediately after the death of the said C. To the use of the heirs male of the body of the said C. And on failure of such issue To the use of the heirs of the body of the said C. And on failure of such issue To the use of the said [*trustees*] their executors and administrators during the life of every son of mine hereafter to be born Upon trust to permit the same son to receive the rents and profits of the said hereditaments during his life subject to the proviso hereinafter contained With remainder To the use of the heirs male of the body of every such son With remainder to the use of the heirs of the body of every such son in such order that the trust and uses in favour of every elder son and his issue shall precede the trust and uses in favour of every younger son and his issue And on failure of such issue To the use &c. Provided that if the said C. or any son of mine hereafter to be born shall become bankrupt or shall do or permit any act or thing whereby the rents and profits of the said hereditaments or any part thereof shall or may be aliened or incumbered then the trust hereinbefore contained for the payment of the rents and profits of the said hereditaments to such son shall thenceforth cease and such rents and profits shall during the remainder of the life of the same son be received and enjoyed by the person or persons for the time being next

beneficially entitled in remainder or reversion expectant on the decease of such son.

To THE USE of A. and his assigns during his life AND from and after his death [*or* for the term of one hundred years to be computed from my death if he shall so long live (*e*) and immediately after the expiration or sooner determination of the same term] To THE USE of the first son born in my lifetime of the said A. and the assigns of such son during his life AND immediately after his death [*or* To THE USE of the first son &c. and the assigns of such son during the term of one hundred years if he shall so long live and immediately after the expiration or sooner determination of the same term] To THE USE of such son's first and every other son successively in remainder one after another and the heirs male of the body of each such last-mentioned first and every other son the elder and the heirs male of his body taking before the younger and the heirs male of his body And on failure of such issue To THE USE of the second and every subsequent son born in my lifetime of the said A. for the life of each such son [*or* for the term of one hundred years if such son shall so long live] with remainder To THE USE of such son's first and every other son successively in tail male in manner hereinbefore expressed with respect to the said A.'s first son and his issue male every elder of such second and other sons and his issue male taking before every younger and his issue male And on failure of such issue To THE USE of the first and every other son born after my death of the said A. and the heirs male of the body of each such son every elder son and the heirs male of his body taking before every younger son and the heirs male of his body AND on failure of such issue To THE USE of the said A. and the heirs of his body AND on failure of such issue To THE USE of my own right heirs for ever.

Limitation for life, remainder to the first and other sons of life-tenant born in testator's lifetime for life; remainder to such sons first and other sons in tail male; remainder to after-born sons in tail male; remainder to first tenant for life in tail; reversion to testator's right heirs; [with variation substituting a term of years determinable on life for the life estate.]

(*e*) See *Coape* v. *Arnold*, 4 D. M. & G. 574; 24 L. J. Ch. 673; 102 R. R. 287.

To THE USE of A. and his assigns during his life AND immediately after his death To THE USE of D. his wife and

Limitations to husband and wife,

remainder to their children as they or the survivor shall appoint;

her assigns during her life And immediately after her death To THE USE of all or any one or more exclusively of the children and (*f*) more remote issue (such issue coming into being in the lifetime of the said A. and D. or the survivor of them) for such estate or estates in such shares subject to such limitations and in such manner in all respects as the said A. and D. by any deed or deeds revocable or irrevocable or as the survivor of them by any deed or deeds revocable or irrevocable or by his or her will shall appoint And in default of appointment and subject to any partial appointment To THE USE of the child or children if more than one of the said A. and D. as tenants in common in equal shares and the heirs and assigns of such child or respective children And in case any of the said children shall die under the age of twenty-one years without leaving issue living at his or their death or respective deaths [*or* under the age of twenty-one years without having been married *or* being a son or sons under the age of twenty-one years or being a daughter or daughters under that age without having been married] then as to as well the share hereinbefore limited to each child so dying as the share or shares limited to such child by this executory limitation To THE USE of the other or others if more than one of the said children in equal shares and the heirs and assigns of such other or others respectively And in case there shall not be any child of the said A. and D. or not any such child who shall attain the age of twenty-one years or who dying under that age shall leave issue living at his or her death [*or* who shall attain the age of twenty-one years or be married *or* who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married] To THE USE of the survivor of the said A. and D. and the heirs and assigns of such survivor for ever.

and in default of appointment to the children in common in fee, with cross executory limitations;

with an ultimate limitation to the surviving parent in fee.

Appointment. Children *and* issue; children *or* issue.

(*f*) It will be observed that this power is in favour of "all or any one or more exclusively of the children and more remote issue;" the commoner form is in favour of "children or more remote issue." The question then arises whether the appointment must not be in favour of children only, or of remoter issue only; in other words, whether an appointment to both children and issue is valid. If the terms of the

power were strictly and literally followed, such an appointment would not be valid, but see *Garthwaite* v. *Robinson*, 2 Sim. 43; 29 R. R. 54; *Lee* v. *Okey*, 1 Y. & C. Ex. 550; *Penny* v. *Turner*, 2 Ph. 493; 17 L. J. Ch. 133; 78 R. R. 158; from which it would appear that an appointment to children and remoter issue would be held valid. The language of the text prevents the occurrence of this question.

Rule in *Wild's Case*;

Where there is a devise to a person and his children or issue, and he has no issue at the time of the devise, such person takes an estate tail. This is the rule in *Wild's Case*, 6 Rep. 16 b.; see Tud. L. C. R. P. Where, however, there are children at the time of the devise, the parent and children take jointly. The rule in *Wild's Case* is not now to be departed from, *Clifford* v. *Koe*, 5 App. Cas. 447; 43 L. T. 322.

—does not apply to personalty.

The rule in *Wild's Case* is not applicable to personalty, *Audsley* v. *Horn*, 1 D. F. & J. 226; 29 L. J. Ch. 201. See also *Re Wynch's Trusts*, 5 D. M. & G. 188; 23 L. J. Ch. 930; 104 R. R. 74; *Jackson* v. *Calvert*, 1 J. & H. 235; *Ward* v. *Grey*, 26 Be. 485; *Re Stanhope's Trusts*, 27 Be. 201; *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613; 29 L. J. Ch. 486; *Byng* v. *Byng*, 10 H. L. C. 171; 31 L. J. Ch. 470; 7 L. T. 1; *Herrick* v. *Franklin*, L. R. 6 Eq. 593; 37 L. J. Ch. 908; *Grieve* v. *Grieve*, L. R. 4 Eq. 180; 36 L. J. Ch. 932; 16 L. T. 201.

Equitable limitation to children in common in fee.

To THE USE of A. and his assigns during his life And after his death To THE USE of —— and —— in fee simple UPON TRUST for the child if only one or the children if more than one of the said A. who either before or after his death shall attain the age of twenty-one years or dying under that age shall leave issue living at his her or their death or respective deaths such children if more than one to take equally as tenants in common and the heirs and assigns of such child or respective children AND if there shall not be any child of the said A. who shall attain the said age or dying under that age shall leave issue living at his or her death UPON TRUST, &c.

Limitations to sons and daughters successively in fee simple, by way of executory use.

To THE USE of the first son of the said A. and the heirs and assigns of such son AND if such son shall die under the age of twenty-one years without leaving issue living at his death To THE USE of the second and every other son of the said A. according to the order of their respective births and the heirs and assigns of each such son in a succession of executory limitations in fee simple so that the estate of each such son shall in the event of his death under the age of twenty-one years without leaving issue living at his death be

divested and go over to his next brother (*g*) And if there shall not be any son of the said A. or not any such son who shall attain the age of twenty-one years or who dying under that age shall leave issue living at his death then To THE USE of the first daughter of the said A. &c.

45 & 46 Vict. c. 39, s. 10.

Restriction on executory limitations.

(*g*) By sect. 10 of the Conveyancing Act, 1882, it is enacted that, in cases of executory limitations contained in an instrument coming into operation after that year, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

Limitation to children and issue, *per stirpes*, in fee.

To THE USE of the children of the said A. living at his death and the issue then living of the children of the said A. then dead as tenants in common and the heirs and assigns of such children and issue respectively but so that such issue shall take equally amongst them the share or shares only which their deceased parent or parents if living would have taken AND if there shall not be any child or issue of a deceased child of the said A. living at his death To THE USE &c.

Devise in fee, in case of death to sons successively in fee;

—charged with a sum for brothers and sisters.

I DEVISE my real estate to A B. if he shall survive me in fee simple And if he shall die in my lifetime leaving sons or a son who shall survive me then to the first second and every subsequent son of A. B. successively according to seniority in fee simple so that the estate of each son shall in the event of his death under the age of twenty-one years without leaving a son living at his death be divested and go over to his next brother Provided always that if any son of A. B. shall become entitled to my real estate under this devise he shall take it subject to and I hereby charge such real estate with the payment of £—— to each of the children of A. B. (other than the son becoming entitled as aforesaid) who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married under that age with the consent of her mother or guardian for the time being And if the said A. B. shall die in my lifetime and there shall not

be any son of his who shall attain the age of twenty-one years then and in that case I devise my real estate to C. B. or to his son or sons in the same manner and charged in all respects as if the preceding devise and proviso were repeated at length with the name C. D. substituted throughout for A. B.

Devise to uses by reference.

To SUCH USES for such estates and with and subject to such powers and provisions as under or by virtue of the said will of —— [*or* of an indenture of settlement dated &c. and made between &c.] and all mesne assurances acts and operations of law shall at the time of my death be subsisting and capable of taking effect of and concerning the hereditaments comprised in the same will [*or* settlement] (*h*).

Trusts by reference. Multiplication of charges.

(*h*) Where property is devised or bequeathed to uses or on trusts by reference, it is usual to add words to the effect that charges or powers of charging are not thereby to be increased or multiplied. Cases may occur where such words would be necessary, see *Cooper* v. *Macdonald*, L. R. 16 Eq. 258; 42 L. J. Ch. 533; 28 L. T. 693. But trusts by reference are not, generally speaking, to be so read as to create a multiplication of charges, *Hindle* v. *Taylor*, 5 D. M. & G. 577; 25 L. J. Ch. 78; 104 R. R. 208; *Boyd* v. *Boyd*, 2 N. R. 486; 9 L. T. 166; *Trew* v. *The Perpetual Trustee Co.*, '95, A. C. 264; 64 L. J. P. C. 49; 72 L. T. 241. That reference to trusts does not necessarily include all the powers given to the trustees, see *Cox* v. *Cox*, 1 K. & J. 251.

Advowson.

I DEVISE the advowson and perpetual right of presentation (*i*) to the rectory of the parish church of —— in the county of—— UNTO and to the use of my son A. B. his heirs and assigns.

Advowson.

(*i*) An advowson, or perpetual right of presentation to a parish church, is an incorporeal hereditament, and if not devised is descendible in the same mode as freeholds of inheritance. But where the vacancy occurs in the lifetime of the patron seised in fee, the next presentation is only a chattel interest and goes to his personal representative, *Mirehouse* v. *Rennell*, 8 Bing. 490; unless the patron is also the incumbent, in which case the next presentation descends to his heir as part of the advowson, *Holt* v. *Bishop of Winchester*, 3 Lev. 47; unless he devises the presentation to another, as he may do, notwithstanding that the church becomes vacant by his death,

An advowson, as temporal property, is assets for payment of debts in the hands of the heir, *Westfaling* v. *Westfaling*, 3 Atk. 460. An advowson appendant to a manor will pass by a devise of the manor;

but an advowson in gross will not pass by a devise of the testator's *lands* simply, though it will pass by the words tenements and hereditaments, *ib.* Where a testator, who was both patron and incumbent, devised the advowson and all other his real estate to trustees for sale, and to pay the *rents* until sale as in the will mentioned, it was held that, as the presentation to a living does not produce rents, the dispositions of the will were inapplicable to that species of property, and the heir-at-law was entitled to present to the living on the vacancy created by the testator's death, *Martin* v. *Martin*, 12 Sim. 579; 11 L. J. Ch. 291. Advowsons in gross will pass under general words of devise—namely, "All other my real estate in the county of L."—notwithstanding that such words are not words of apt description, *In re Hodgson*, '98, 2 Ch. 545; 67 L. J. Ch. 591; 79 L. T. 345.

Next presentation.

I BEQUEATH the next presentation to the vicarage and parish church of —— in the county of —— which I have recently purchased from the patrons of the said vicarage UNTO my son-in-law C. D. his executors and administrators and assigns.

Advowson.

I DEVISE the advowson of the rectory of —— in the county of —— UNTO A. B. and C. D. their executors and administrators for the term of 60 years computed from my death if my son the Rev. M. N. shall so long live UPON TRUST whenever the said advowson shall become vacant after my death to present thereto my said son M. N. if willing to accept the same AND from and after the determination of the said term and in the meantime subject thereto and to the trusts thereof I devise the said advowson TO THE USES herein declared of and concerning my real estate devised in strict settlement [*or* of and concerning my residuary real estate].

Devise of advowson, the testator being both patron and vicar;

—to present an aged clerk;

I DEVISE the advowson of the vicarage and parish church of —— in the county of—— of which I am the present vicar TO SUCH USES as the said [*trustees*] shall at any time within 21 years from my death by deed appoint And subject thereto TO THE USE of the said [*trustees*] in fee simple UPON TRUST forthwith after my death to present to the said church such fit person not being under the age of [65] years at the time of such presentation as my trustees or trustee shall think proper in order that such person may be instituted and inducted to the said church AND subject to the aforesaid

trust UPON FURTHER TRUST with all convenient speed after the induction of such person as aforesaid to sell the said advowson subject to such special or other conditions in all respects as my said trustees or trustee shall think fit and if it shall be lawful to sell the same by public auction then either by public auction or private contract (*k*) AND I DECLARE that my said trustees or trustee shall stand possessed of the moneys to arise from the said sale upon the trusts following: —and sell.

(*k*) The Benefices Act, 1898 (61 & 62 Vict. c. 48), has imposed restrictions upon the sale of advowsons by public auction. Sect. 1, sub-sect. 2, of that Act enacts as follows:— Sale of living, or next presentation.

"It shall not be lawful to offer for sale by public auction any right of patronage, save in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the benefice is situate or in an adjoining parish and belonging to the same owner as the advowson, and any person who offers any right of patronage for sale by auction in contravention of this section, or who bids at any such sale, shall be liable on summary conviction to a fine not exceeding one hundred pounds."

This Act amends the law with regard to the sale and transfer of rights of patronage in other important respects.

In previous editions the precedents have made provision for the sale by the trustees in certain events of the next presentation only. These provisions are omitted from the precedents in this edition in consequence of sect. 1 (b) of the above Act, which, it is conceived, renders the sale of next presentations invalid.

I DEVISE the advowson of the parish church of —— in the county of —— UNTO and to the use of —— and —— in fee simple UPON TRUST as soon as may be after my death to present to the said church and rectory my son —— if qualified and willing to accept the same BUT if my said son shall not be qualified and willing to accept the same and shall at my death be under the age of [25] years then UPON TRUST from time to time as occasion shall require to present to the said church and rectory such duly qualified person as my trustees or trustee for the time being shall select Nevertheless in every such case taking from the nominee a bond or covenant for the resignation of the said church and rectory (*l*) if and when my said son —— shall become qualified and willing to accept the

Devise of advowson to trustees,

to present testator's son, if qualified;

—if not, to present a clerk, taking bond of resignation in favour of son;

same And upon further trust as soon as may be after such resignation to present my said son —— to the said church and rectory And subject to the trusts aforesaid I direct my said trustees to stand seised and possessed of the said advowson upon the trusts following that is to say If my said son —— shall by virtue of the trusts hereinbefore declared be presented to the said church then and as soon as conveniently may be after my said son shall have been inducted thereto Upon trust to convey the said advowson unto and to the use of my said son —— his heirs and assigns But if my said son shall not within six calendar months after my death or on his attaining the age of [25] years whichever shall last happen be qualified or being qualified shall not have accepted or shall be unwilling to accept the said church then Upon trust to sell the said advowson and treat the same in all respects as included in the devise of my residuary real estate.

—when son is inducted, to convey to him.

If son shall not accept, to sell.

Bond of resignation.

(*l*) A general resignation bond, whereby the obligor binds himself to resign a living at the request of the patron, is void, *Bishop of London* v. *Ffytche*, 2 Br. P. 211; and in *Fletcher* v. *Lord Sondes*, 1 Bli. N. S. 144; 30 R. R. 32, it was held that a special bond to resign in favour of one of two persons named was invalid. But by 9 Geo. 4, c. 94, an engagement before presentation, to resign a benefice in favour of one person or one of two persons named or described, is legalised, provided that where two persons are named, each shall be, either by blood or marriage, related to the patron within the limits specified in the Act.

9 Geo. 4, c. 94.

Devise of advowson to trustees;

I devise the advowson of the rectory of —— in the county of —— To such uses as the said [*trustees*] or the survivors or survivor of them shall by deed appoint and subject thereto To the use of the said [*trustees*] in fee simple Upon trust to sell the said advowson subject to such conditions as my said trustees may think fit and if it shall be lawful to sell the same by public auction then either by public auction or private contract (*ll*) And I declare that the proceeds of sale of the said advowson shall be applied as part of my residuary personal estate Provided always that it shall be lawful for my said trustees with the consent of my wife during her life and after her death in their own discretion to postpone the sale of the said advowson for the purpose of enabling my said trustees to present to the said rectory such son of mine as shall first

—to sell.

Power to postpone sale to present a son of testator;

be qualified and willing to accept the same And for that purpose in case no son of mine shall at my death be qualified and willing to accept the said rectory to fill any vacancy or vacancies therein in such manner and upon such terms as my said trustees shall deem expedient And I direct that in case at any time after my death and before the said advowson shall have been sold a son of mine shall be qualified and willing to accept the said rectory then my said trustees shall forthwith take and do all proper measures and things for procuring the induction of such son to the said rectory Provided always that if more than one son of mine shall desire to be presented to the said rectory the elder shall be preferred And I authorise my said trustees to sell the said advowson to any son of mine who shall have been inducted to the said rectory upon such terms as my said trustees shall deem expedient and in particular to accept such personal or other security for the whole or part of the purchase-money as my said trustees shall think fit Provided always that in case any son of mine shall be presented to the said rectory under the provisions hereinbefore contained the benefit of such presentation shall be considered to be of the value of £—— and in the division of my residuary estate such son shall be considered to have received £—— in part satisfaction of his share thereof.

—elder son preferred.

Power to sell to son.

Value of presentation to be brought into account by son.

(*ll*) See note (*k*), p. 479.

And whereas it is my desire that the entail created by my will may be prevented from being barred or destroyed as long as the rules of law will permit I hereby nominate and appoint [*names*] to be protectors (*m*) of the estate tail created by this my will during the continuance of the estate or respective estates for life for the time being prior or antecedent to such estate tail with all such discretionary powers authorities and privileges (*n*) as are annexed to the office of protector Provided always and I hereby declare that in case any [*or* either] of the said [*protectors*] or any protector or protectors to be appointed as hereinafter mentioned shall die or be desirous to relinquish the office of protector (*o*) then and in every such case it shall be lawful for the surviving or continuing protectors or protector for the time being or if there

Appointment of protectors of estate tail.

Power of appointment of new protectors;

shall not be any such then for the protector or protectors so relinquishing the office as aforesaid if he or they shall be willing to exercise this power and if also none such then for the executors or executor administrators or administrator for the time being of the last deceased protector by any deed or deeds to be enrolled in Chancery to nominate and appoint one or more person or persons not being tenant for life (*p*) in possession for the time being of the hereditaments hereinbefore devised to be a protector or protectors in the room of the person or persons who shall so have died or relinquished the office as aforesaid and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise either in conjunction with the surviving or continuing protector or protectors or solely (as the case may be) the same powers authorities and privileges in every respect as he or they might have exercised or would have had and enjoyed if he or they had been hereby appointed a protector or protectors of the said estate tail.

Protectors. 3 & 4 Will. 4, c. 74.

(*m*) The number of appointed protectors must not exceed three; they must be persons *in esse*, and not aliens. See 3 & 4 Will. 4, c. 74, s. 32; 4 Dav. Conv. 530; *Bankes* v. *Le Despencer*, 11 Sim. 508; 51 R. R. 313. The office survives: so that where a testator appointed two protectors, without any provision for filling up a vacancy, and one of them died, the consent of the surviving protector was effectual to bar the entail, *Bell* v. *Holtby*, L. R. 15 Eq. 178; 42 L. J. Ch. 266; 28 L. T. 9.

(*n*) The protectorship is an irresponsible office, and the protector may sell his concurrence in the barring or destruction of the entail (3 & 4 Will. 4, c. 74, s. 36).

(*o*) The power of appointment of new protectors is authorised only in the cases of death and relinquishment by deed. In other cases the vacancies are supplied by the Act itself. The deed of new appointment must be enrolled within six calendar months after execution.

(*p*) If the owner of the prior estate for life is made a protector, the office might, by the death or retirement of his colleagues, become vested solely in him. In such a case he ought to be prohibited from acting as protector; the effect of which would be that the Court of Chancery would be protector, until the vacancy was supplied under the power.

Devise of lands contracted to be sold.

And whereas I have lately contracted to sell (*q*) to —— for the sum of £—— my freehold estate situate at —— I hereby devise the same estate (subject to the said contract) to A. B. his heirs and assigns And in case the said contract

shall be carried into execution then I give to the said A. B. his executors administrators and assigns the said sum of £—— purchase-money which I or the executors of my will shall receive for the same And I direct that the costs incident to the said contract for sale whether the same be completed or not be borne by my residuary personal estate.

If sold, purchase money instead.

(*q*) A devise by a testator of an estate which he "lately contracted to sell to M.," has been held to be a devise of the legal estate merely to enable the devisee to carry out the contract, but not so as to entitle the devisee to the purchase-money, *Knollys* v. *Shepherd*, cited 1 J. & W. 499. It is conceived, however, that if the purchase had not been completed, the devisee in the above case would have been entitled to the land. As to lands specifically devised and subsequently sold, see note to sect. 23, *ante*, p. 54. And as to lands contracted to be sold passing under a devise of trust estates, when the testator died before completion, see *Lysaght* v. *Edwards*, 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787.

Devise of lands contracted to be sold.

From the moment of entering into an agreement for sale, the vendor becomes in contemplation of equity a trustee for the purchaser; he is, however, a trustee *sub modo* only, *i.e.* provided nothing happens to prevent the performance of the contract. See *Wall* v. *Bright*, 1 J. & W. 494, where a testator who had contracted for the sale of an estate devised all his lands to trustees upon trust to sell, with power to give discharges to purchasers, and it was held that the land contracted to be sold passed by the devise (but see the remarks on that case, Jarm. Wills, 656; see also *Purser* v. *Darby*, 4 K. & J. 41): the purchase-money in such a case would, however, be payable, not to the trustees by virtue of the devise, and notwithstanding the power to give discharges, but to the executors, as part of the general personal estate of the testator, *Eaton* v. *Sanxter*, 6 Sim. 517; 3 L. J. Ch. 197. But if the purchase-money has been paid and possession of the estate delivered, then the vendor is in the position of a mere trustee for the purchaser, even though the legal estate has not been actually conveyed. In such a case the legal estate would formerly have passed by a devise of trust estates, and will now vest in the executors. And now, by sect. 4 of the Conveyancing Act, 1881, where at the death of any person after 1881 there is a subsisting enforceable contract for sale of a freehold estate in land, his personal representatives are empowered to convey the estate vested in him at his death in any manner proper for giving effect to the contract, but without prejudice to the beneficial rights of any person claiming under the will or intestacy of the vendor.

44 & 45 Vict. c. 41, s. 4.

I DEVISE all &c. [*to uses*] PROVIDED ALWAYS that if at the time of my death I shall have sold and conveyed the said estate or any part thereof the trustees or trustee for the time

Gift of money in lieu of estate, if sold.

being of my will shall invest the sum of £—— or a proportionate part thereof to be fixed by the said trustees or trustee in their or his discretion upon trusts corresponding as nearly as may be with the uses hereinbefore declared concerning the said estate.

Contract to purchase.

Discretion in trustees to complete.

And whereas I have contracted with —— of —— for the purchase of certain freehold hereditaments at —— I hereby authorise my trustees or trustee to complete such purchase or to relinquish the same as circumstances may require and as they or he in their or his discretion may think best And I authorise my trustees or trustee to accept such a title (whether strictly marketable or not) to the said hereditaments as they or he shall deem it prudent to accept and if they or he shall think fit to waive any objections and requisitions and to dispense with any inquiries and evidence which they or he may be entitled (and but for this authority would be bound) to insist on make or require.

Devise of estate contracted to be purchased.

I devise unto A. B. of —— his heirs and assigns the freehold estate situate at —— which I have contracted to purchase for the sum of £—— from Mr. —— of —— which sum if unpaid at my death is to be paid out of my personalty in exoneration of the said estate And in case a good title to the said estate cannot be made I direct my executors to invest the sum of £—— in the purchase of freehold leasehold or copyhold hereditaments in such part of England as the said A. B. his heirs or assigns shall choose and by writing under his or their hands direct And I direct that upon payment by my executors of the said sum of £—— such hereditaments shall be conveyed and assured unto the said A. B. his heirs executors administrators and assigns respectively according to the tenure thereof in lieu of the estate which I have contracted to purchase as aforesaid.

Devise to children as parents shall appoint; in default, as survivor shall appoint; in

To and for such uses estates intents and purposes and in such manner and subject to such charges powers and provisions for the benefit of all or any one or more of the issue of my said sister [*name*] whether children grandchildren or more remote issue born in her lifetime as she the said [*name*]

and [*name*] her husband at any time or times by deed with or without power of revocation and new appointment to be executed by them in the presence of and to be attested by two or more witnesses shall jointly appoint or as the survivor of them after the death of either of them shall in like manner or by his or her last will appoint AND in default of and subject to any and every such appointment TO THE USE of an only child or all the children of the said [*sister*] whether born before or after my death if more than one as tenants in common in equal shares and the respective heirs and assigns of such child or children as aforesaid But if any of such children born in my lifetime shall die without leaving issue living at his her or their death or respective deaths then as to the share or shares of the child or respective children so dying as well original as accruing under this limitation TO THE USE of the other child or children of the said [*sister*] and if more than one as tenants in common in equal shares and the heirs and assigns of such other child or respective children AND if no child of the said [*sister*] born in my lifetime shall leave issue living at his or her death or no child of my said sister born after my death shall attain the age of twenty-one years or dying under that age shall leave issue living at his or her death Then notwithstanding any appointment to be made in exercise of the power hereinbefore given of appointing to children and issue so that as well the estates and interests to be created by any exercise of such power as the estate and interests hereinbefore limited in default of appointment may be defeasible by this executory limitation over TO THE USE &c.

default, to children equally.

Accruer, on death of children without issue in favour of the others or other.

Executory gift over.

I DIRECT that my sons successively and according to their respective seniorities shall have the option of purchasing in one lot the real and leasehold estates belonging to me at the time of my death situate in the parish of —— at a valuation to be made by two competent valuers to be appointed by my trustees or trustee or if such valuers shall disagree by a third valuer to be appointed in writing by the two first-named valuers before entering upon the valuation as their umpire such option to be declared by notice in writing delivered to

Right of pre-emption to several sons successively.

my trustees or any one of them or left at their or one of their usual or last known places or place of abode by my eldest son within one calendar month next after my death and by my other sons respectively within one calendar month next after the time when the period allowed to the person next preceding him in seniority shall have expired or such person shall have declared in writing his intention not to purchase the same real and leasehold estates but no purchaser under the trusts of this my will shall be obliged to take notice of or be affected by this power of pre-emption.

Devise of two messuages to trustees to offer one to testator's first and second sons and the other to the same sons, reversing their order, in succession, and if they decline, then, to sell.

I DEVISE all that piece of ground situate &c. and all those two messuages &c. thereon UNTO the said [*trustees*] in fee simple UPON TRUST as soon as conveniently may be after my death to offer to my eldest son [*name*] and my second son [*name*] successively the option of becoming the purchaser of the easternmost of the said two messuages and the ground thereto belonging at the price of £—— and to offer to my said second and eldest sons successively the option of becoming the purchaser of the other of the same two messuages and the ground thereto belonging at the price of £—— and to allow to each of my said sons the space of two calendar months from the time of making such offer to him for determining whether he will accept or refuse the same AND in case my said sons or either of them shall accept such offer of the same messuages or either of them within the space aforesaid then on payment to the trustees or trustee for the time being of this my will of the purchase-money for the same to convey and assure the same unto such son or sons respectively BUT if the same messuages or either of them shall not be purchased by my said sons or one of them pursuant to the trust last aforesaid THEN upon trust to sell and absolutely dispose of the said messuages or such of them as shall not be so purchased with the ground and appurtenances thereunto belonging AND I declare that my trustees or trustee shall stand possessed of the moneys to arise from the sale of the said messuages and premises whether purchased by my said sons or either of them or by any other person or persons upon the trusts hereinafter expressed and contained

concerning the moneys to arise from my residuary personal estate.

General gift of real and leasehold estates to son, subject to debts and legacies, and to a prior life estate in part.

And as to my freehold messuages lands tenements and hereditaments particularised in the second schedule (*r*) hereto And also as to my messuages lands tenements and hereditaments particularised in the third schedule hereto And all other the property real and personal not hereinbefore specifically disposed of which I shall be possessed of or have power to dispose of at the time of my death (subject to the payment of my debts and funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed and including after my wife's death the freehold hereditaments specified in the first schedule hereto) I give devise appoint and bequeath the same unto my said son [*name*] his heirs executors administrators and assigns absolutely And I declare that all sales leases exchanges mortgages charges contracts and other dealings whatsoever to be made created entered into or transacted by my said son his heirs executors administrators or assigns for valuable consideration of or upon or in respect of my residuary real property or any part or parts thereof shall as against my creditors and pecuniary legatees and for the protection and exoneration of purchasers and other parties to such sales or other dealings take effect as paramount and precedent to the charges in favour of such creditors and legatees created by my will and be of the same force as if such charges were omitted from my will [yet so that as to the freehold hereditaments specified in the first schedule hereto such sales or other dealings be during the life of my wife made created or entered into with her concurrence] and this declaratory clause shall not exclude prejudice or affect any protection or exoneration to which such purchasers or other parties would be entitled under the rules or doctrines of equity.

Special declaration as to power of devisee to sell and manage notwithstanding the charges.

(*r*) See note, *ante*, p. 463.

Real estate and residue of personal estate;

I devise unto my said trustees [*names*] in fee simple all the real estate and bequeath to them the residue of the personal estate of or to which I shall be seised possessed or

entitled at my death upon the trusts and subject to the
—sale and conversion. declarations following namely UPON TRUST to sell and convert into money my said estates or such parts thereof as shall be of a saleable or convertible nature and to get in the other
Power to sell minerals apart from the surface; parts thereof WITH power as to any of the said estates under which there are or are supposed to be minerals to sell the surface apart from the minerals or to sell the minerals together with or apart from the surface and to grant or reserve such rights of way air and water of instroke and outstroke and other easements in upon over or under any of the said estates as may be necessary or desirable for the most effectual and advantageous winning working storing manufacturing selling and carrying away of any such minerals [or any minerals under adjacent or neighbouring lands] WITH full discretionary power as to the time or mode of payment of the purchase-money or indemnity against or apportionment of incumbrances or as to any other matters relating to the sale as my said trustees shall judge expedient And generally to effect the sale and conversion of my said estates on such terms and in such manner as they shall
—discretionary power to postpone conversion; deem most advantageous ALSO full discretionary power to suspend (*s*) for such period as my said trustees shall judge expedient [*or* so long as my said wife shall continue my widow or as any child of mine being a son shall be under the age of twenty-one years or being a daughter shall be under that age not having been married] the sale conversion or getting in of my said estates or any part or parts thereof respectively [*or* of such part or parts of my said estates as shall yield present income *or* of my said real estate or any part or parts thereof and of such part or parts of my personal estate as shall consist of investments in or upon any stocks funds shares or securities British or foreign real
—interim management; or personal yielding or not yielding present income] ALSO full discretionary power during the suspense of the sale conversion or getting in of the said estates respectively to manage and order all the affairs thereof as regards letting occupation cultivation repairs insurance against fire receipt of rents indulgences and allowances to tenants and all other matters but so that no lease shall be granted otherwise than

from year to year or for a term not exceeding twenty-one years in possession at the most improved rent without fine or premium ALSO full discretionary power to employ receivers bailiffs accountants agents and others in or about the affairs of my said estates with such salaries or remunerations as my said trustees shall think reasonable AND I DECLARE that for the purposes of enjoyment and transmission under the trusts hereinafter contained my said estates shall be considered as money from the time of my death and the rents dividends interest and other yearly produce thereof respectively to accrue due after my death and until the actual sale conversion and getting in thereof shall as well during the first year after my death as in subsequent years be deemed the annual income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the nature of the investments yielding the same AND as to the moneys to arise from the sale conversion and getting in of my said estates UPON TRUST thereout in the first place to pay or retain all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses (*t*) and in the next place to pay the pecuniary legacies hereinbefore bequeathed and appropriate the funds hereinbefore directed to be appropriated for answering the annuities hereinbefore bequeathed and in the meantime to pay the same annuities AND upon further trust to invest the ultimate surplus of the said trust moneys in the names of my said trustees in or upon permanent public stocks funds or securities of the United Kingdom or on the security of a mortgage or mortgages of any freehold or copyhold [*or* leasehold] estates in England or Wales (but not elsewhere and not in or upon any other kind of security) and from time to time with the consent in writing of my wife until she shall die or marry and afterwards in the discretion of my said trustees to vary the investment or investments of the said trust moneys for any other or others of the description contemplated by this trust AND UPON FURTHER TRUST to permit and empower my wife to receive the annual income of the said moneys or the stocks funds and securities whereon the

—constructive conversion from death;

—rents, &c., to be deemed income.

Trusts of proceeds;

—expenses, debts, legacies, and annuities;

—investment of ultimate surplus;

—income to wife during her widowhood;

same shall be invested as aforesaid (which moneys stocks funds and securities are hereinafter referred to under the denomination of "the said trust fund") during her life if she shall so long continue my widow she thereout maintaining educating and bringing up in a manner suitable to their station in life such of my sons as shall for the time being be under the age of twenty-one years and such of my daughters as shall for the time being be under that age not having been married AND immediately after her death or future marriage as to as well the capital as the annual income of the said trust fund IN TRUST for my child if only one or all my children if more than one who either before or after the death or future marriage of my wife shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married and if more than one to take in equal shares BUT I declare that if such child or children or any of them shall be a daughter or daughters then [one-half of] the said trust fund or [of] the share thereof to which such daughter or each of such daughters shall become entitled shall be held by my said trustees upon the trusts following namely UPON TRUST with the consent in writing of my daughter entitled thereto and after her death in the discretion of my said trustees to convert the same into money and invest the moneys to arise therefrom in or upon any of such securities as (and not any other than) are hereinbefore authorised and from time to time with the like consent or in the like discretion to vary the investment or investments for any other or others of the same description AND upon further trust to pay the annual income of the said moneys or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund") as and when the same shall from time to time become actually receivable into the proper hands of my same daughter for her separate use without power of anticipation as a strictly personal and inalienable provision during her life unless and until she being discovert shall do or suffer any act matter or thing whereby notwithstanding the restriction on anticipation hereinbefore imposed the same income on any part thereof

—charged with maintenance, &c., of children;

—capital to children equally.

Settlement of the shares of daughters;

—investment;

—inalienable life interest;

shall either voluntarily or involuntarily be aliened or incumbered But if she being discovert shall do or suffer any such act matter or thing as aforesaid then immediately after the doing or suffering thereof as to the annual income of the said settled fund to accrue during the remainder of her life Upon trust to pay or apply the same in such manner as the same would by virtue of the trusts hereinafter contained be payable or applicable if my same daughter were actually dead And immediately after the death of my same daughter as to as well the capital of the said settled fund as the annual income thenceforth to accrue due for the same In trust for all or any one or more exclusively of the children and remoter issue of my same daughter (such remoter issue being born in her lifetime) in such proportions for such interests and generally in such manner as she shall from time to time by deed with or without power of revocation and new appointment or by her will appoint But no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot (*u*) And in default of appointment and subject to any partial appointment In trust for the child if only one or all the children if more than one of my same daughter who either before or after her death shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares And if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then In trust for such persons for such interests and generally in such manner in all respects as my same daughter shall by will appoint And in default of appointment and subject to any partial appointment In trust for the person or persons who at the death of my same daughter shall be of her blood and of kin to her and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she were dead a spinster domiciled in England and intestate such persons if more than one to take

—children and other issue of daughter, as she shall appoint;

hotchpot;

—in default, for children equally;

—if no child,

—as daughter shall by will appoint;

—daughter's next of kin.

Daughter empowered to appoint a life-interest to a husband.

in the proportions prescribed by the same statutes AND I EMPOWER my same daughter (notwithstanding the trusts herein contained subsequently to the trust in her own favour) by deed executed either after or in contemplation of her marriage or by will to appoint the annual income to accrue due after her death of the said settled fund or any part of such income to and for the life of any husband of my same daughter who shall survive her I EMPOWER my said trustees with the consent in writing of my wife during her widowhood and after her death or marriage in their discretion and notwithstanding any of the trusts hereinbefore declared of the said trust fund to apply any part or parts not exceeding in the whole one-half [*or* one-third part *or* not exceeding in the whole the amount or value of £—— sterling] of the capital of the fund or share to which each or any child of mine shall be entitled or contingently entitled in or towards the advancement in life or otherwise for the benefit of the same child whether such child shall be a son or daughter or shall be under the age of twenty-one years or not (*a*) I ALSO EMPOWER my said trustees with the consent in writing of my wife during her widowhood and after her death or marriage in their discretion to apply any part or parts not exceeding one-half of the capital of the share to which each or any child or issue whether under the age of twenty-one years or not of each or any daughter of mine shall be entitled or contingently entitled by virtue of any appointment or appointments or otherwise under the trusts aforesaid (unless otherwise directed as aforesaid) in or towards the advancement in life or otherwise for the benefit of such child or issue but no such application as last aforesaid shall be made during the life of my same daughter without her previous consent in writing nor after her death to the prejudice of the life interest of any husband in whose favour an appointment shall have been made by her under the power for that purpose hereinbefore contained without his like consent I DECLARE that if any son or daughter of mine shall die in my lifetime and my child or children of such son or daughter shall be living at my death then the said trust fund or the share thereof to which the son or each son so dying would if

Advancement of testator's children, irrespective of minority;

—advancement of daughter's issue, irrespective of minority.

Substitution of grandchildren for children of testator predeceasing him.

living at my death and if then of the age of twenty-one years or to which the daughter or each daughter so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my said trustees upon such trusts and subject to such provisions in favour of the child or children of such son or daughter respectively as the same would have been held if as regards a son so dying such son were a daughter and had died immediately after my death or as regards a daughter so dying such daughter had died immediately after my death AND in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust fund by virtue of my will then as to the same trust fund IN TRUST for such persons for such interests and generally in such manner as my wife she continuing my widow at her death shall by her will appoint AND in default of such appointment and subject to any partial appointment IN TRUST for the person or persons who at the death or future marriage of my wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal effects of intestates would be entitled to my personal estate if I were to die immediately after the death or marriage of my widow intestate or domiciled in England such persons if more than one to take in the proportions prescribed by the same statutes.

On failure of previous trusts;

—as testator's wife shall by will appoint;

—for testator's next of kin.

(*s*) In a trust for sale "so soon as convenient" after the testator's death, the trustees refused an offer of 900*l.*, and the estate remained unsold for twenty-three years: the trustees were held liable for the difference between 900*l.* and the produce of the actual sale, *Fry* v. *Fry*, 27 Be. 144; 28 L. J. Ch. 591. Postponement of sale. Trustees' liability.

(*t*) Testamentary expenses include the costs of an action for administration of the testator's estate, *Miles* v. *Harrison*, L. R. 9 Ch. 316; 43 L. J. Ch. 585; 30 L. T. 190; *Harloe* v. *Harloe*, L. R. 20 Eq. 471; 44 L. J. Ch. 512; 33 L. T. 247; *Sharp* v. *Lush*, 10 Ch. D. 468; 48 L. J. Ch. 231; *Penny* v. *Penny*, 11 Ch. D. 440; 48 L. J. Ch. 691; 40 L. T. 393. And the costs, so far as they are increased by administration of the real estate, *In re Middleton*, 19 Ch. D. 552; 51 L. J. Ch. 273; 46 L. T. 359. Testamentary expenses.

(*u*) As to hotchpot, see Co. Litt. 177 a; 22 & 23 Car. 2, c. 10, s. 5; 2 Bl. Comm. 16th Ed. p. 190; *Rucker* v. *Scholefield*, 1 H. & M. 36; 32 L. J. Ch. 46; *MacLaren* v. *Stainton*, 27 L. J. Ch. 442; *In re Cosier*, '97, 1 Ch. 325; 66 L. J. Ch. 236; 76 L. T. 31. Life and reversionary interests must be valued, and the value brought into hotchpot under the usual Hotchpot.

hotchpot clause, *Eales* v. *Drake*, 1 Ch. D. 217; 45 L. J. Ch. 51. As to the absence of a hotchpot clause, see *In re Bacon's Settlement Trusts*, 42 Ch. D. 559; 58 L. J. Ch. 823; 61 L. T. 458.

(*a*) The power of advancement is sometimes omitted on the supposition that it will be inserted in the instrument of appointment. The insertion of the power in the will provides not only for the case, which is of frequent occurrence, of the instrument of appointment containing no such power, but also for the case of there being no appointment.

Residuary devise and bequest.

I DEVISE and bequeath all hereditaments whatsoever of or to which I shall be seised or entitled at my death not otherwise herein disposed of And also all leasehold tenements sums of money and other personal estate to which I shall be entitled at my death not otherwise herein disposed of (all which are together hereinafter referred to as the said residuary trust premises) unto and to the use of my said trustees [*names*] their heirs executors administrators and assigns UPON TRUST by and out of the rents interest and other annual proceeds thereof or by exercising the powers to sell and mortgage hereinafter contained or either of them as my trustees shall in their absolute discretion think proper to pay my funeral and testamentary expenses and my debts and the legacies hereinbefore given and any other legacies I shall hereafter bequeath free from legacy duty and without deduction and to pay such sums of money as my trustees shall think proper to expend in altering or improving any of the said residuary trust premises or in completing any messuage or other building on the said trust premises that shall be in course of erection at the time of my death and all succession and legacy duties that shall be payable by reason or in consequence of any devise or bequest herein contained and all costs charges and expenses that my trustees shall incur in carrying into effect any of the trusts or purposes of this my will so far as the same relate to or comprise the said residuary trust premises AND subject and without prejudice to the trusts aforesaid UPON TRUST to pay unto my wife an annuity of £—— during her life but in case she shall marry again then the said annuity of £—— shall be reduced to an annuity of £—— and shall be for her separate use and without power to anticipate the growing payments thereof AND I direct that

Upon trust;

—to pay debts, &c.;

—to repair and complete buildings;

—to pay succession and legacy duties, and costs;

—to pay wife annuity of £——;

—reducible to £—— on marriage;

the said annuity of £—— or £—— as the case may require shall be paid by equal quarterly payments the first payment of the said annuity of £—— to be made on the expiration of three calendar months next after my death and the first payment of the said annuity of £—— to be made on the expiration of three calendar months next after the marriage of my widow if she shall be living at the respective periods aforesaid And as to the said residuary trust premises subject and without prejudice to the trusts aforesaid Upon trust for my child if only one or all my children if more than one who either before or after my death being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be previously married with the consent of her or their guardians for the time being and if more than one as tenants in common but not in equal shares it being my intention that the share of each of my sons who shall attain a vested interest under the trust last aforesaid shall be to the share of each of my daughters who shall attain a vested interest under the same trust in the proportion of three to two I empower my trustees if they in their absolute discretion shall think proper to postpone the ultimate division of the said residuary trust premises until the —— day of —— 19— [*or* for any term not exceeding twenty-one years from my death] with power for them to advance and pay to each of my sons after he shall have attained a vested interest in the said residuary trust premises under the trust last aforesaid from time to time or at any time any sum or sums of money not exceeding together the sum of £—— in part satisfaction of his ultimate share and also to pay to each of my daughters after she shall have attained a vested interest under the trust last aforesaid from time to time or at any time any sum or sums of money not exceeding together the sum of £—— in part satisfaction of her ultimate share I empower my trustees and if deemed expedient by exercising the powers to sell and mortgage hereinafter contained to raise advance and apply any sum or sums of money not exceeding together the estimated value of one-half of the expectant share for the time being of any child of and in the said residuary trust premises

—to be paid quarterly;

—subject as aforesaid;

—upon trust for children of testator;

—in unequal shares.

Discretion to postpone division.

Advancement of a gross sum after attaining vested interest.

Advancement out of expectant share.

either in possession or reversion for the placing him or her in any profession business or employment or for his or her instruction therein or on his or her marriage or to pay any debts or sums of money claimed to be due from him or her or otherwise for his or her benefit or advancement in the world and that whether such child shall then have attained a vested interest in his or her share or not but my trustees shall not exercise this power of advancement during the widowhood of my wife without her consent in writing.

Heir-looms;

I DIRECT that all my plate pictures books and furniture which at the time of my death shall be in or about my house at —— shall be deemed heir-looms and go along with my said house to the person or persons who under the limitations hereinbefore contained shall for the time being be entitled to the same (*b*) and for that purpose I exempt the said plate pictures books and furniture from the payment of my debts and legacies (*c*) AND I DECLARE that such heir-looms shall be subject to an executory limitation over on the death under the age of twenty-one years of any tenant in tail by purchase of the said house (*d*) to or in favour of the person or persons entitled under the subsequent limitations according to the tenor of such limitations.

—exonerated from testator's debts;

—but subject to limitation over.

Heir-looms.

(*b*) Where there is a gift to a person and his successors to be enjoyed with and go with the title in the nature of heir-looms, this is construed as a direct, and not an executory, gift to the first person having the title, and he takes absolutely, *Rowland* v. *Morgan*, 2 Ph. 764; 18 L. J. Ch. 78; 78 R. R. 282; *In re Johnston*, 26 Ch. D. 538; 53 L. J. Ch. 645; 52 L. T. 44. And even if the gift is qualified by any such expression as "so far as the rules of law or equity permit," this does not alter the construction, *Shelley* v. *Shelley*, L. R. 6 Eq. 540; 37 L. J. Ch. 357; *Tollemache* v. *Earl of Coventry*, 2 Cl. & F. 611; 37 R. R. 260; *In re Viscount Exmouth*, 23 Ch. D. 158; 52 L. J. Ch. 420; 48 L. T. 422; *In re Hill*, '02, 1 Ch. 807; 71 L. J. Ch. 417; 86 L. T. 336. But where it clearly appears that the testator's gift is intended to be executory, the Court will model the gift so as to carry into effect as far as possible the testator's wishes, *Lord Stamford* v. *Hobart*, 3 Bro. P. C. 31—33; *Lord Dorchester* v. *Lord Effingham*, Sir G. Coop. 319; 3 Be. 180 n.; 10 Sim. 587 n., 592; *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543; 39 L. J. Ch. 505. Thus where there was a gift in these terms "As to all the household furniture, paintings . . . and the whole contents of

my said house . . . I bequeath the same to my trustees . . . upon trust that they shall select . . . a collection of the best for the said Earl of Essex and his successors to be held and settled as heir-looms and to go with the title," this was held to be a direction to settle the furniture, &c., and the Court gave the first holder of the title only a life interest. But a gift of plate, and also of a leasehold house to the sixth Earl of Essex and "to his successors and to be enjoyed with and to go with the title" was held to be a direct executed gift which the Court could not model, and that the sixth Earl took absolutely, *In re Johnston*, 26 Ch. D. 538; 53 L. J. Ch. 645; 52 L. T. 44.

(*c*) Legacy duty is not payable on plate or other articles not yielding income bequeathed to persons in succession, until the articles are either sold, or devolve upon some person having power to sell, or an absolute interest therein (36 Geo. 3, c. 52, s. 14).

Legacy duty on plate, &c.

(*d*) See the note on p. 427.

Personal chattels in strict settlement as heirlooms, where there is no real estate.

I GIVE all the plate library of books book-cases manuscripts framed and unframed pictures paintings drawings prints engravings bronzes medals sculptures and statuary of which I shall die possessed to [*trustees*] UPON TRUST during the life of my wife to permit the same to be enjoyed by her AND from and after her death UPON SUCH TRUSTS as shall as nearly as the rules of law and equity will permit correspond with limitations of freehold estate to the effect following (this is to say) TO THE USE of my eldest son during his life with remainder to the use of his first and other sons successively according to priority of birth in tail male WITH remainder to like uses in favour of my second and every other son successively according to priority of birth and their respective first and other sons successively for life and in tail male respectively WITH remainder to the use of the first and other sons of my first son successively according to priority of birth in tail WITH remainder to the use of the first and other sons successively according to priority of birth of my second and other sons successively as aforesaid in tail WITH remainder TO THE USE of the daughter or daughters of my first son in tail and if more than one as tenants in common with cross-remainders in tail between them WITH remainder to like uses in tail in favour of the daughter or daughters of my second and other sons successively as aforesaid With remainder To THE USE of my first and other sons successively according to priority of birth in tail With

remainder To THE USE of my daughter or daughters in tail and if more than one as tenants in common with cross-remainders in tail between them With remainder To THE USE of my own right heirs BUT I DECLARE that the chattels lastly hereinbefore bequeathed shall be subject to an executory limitation over on the death under the age of twenty-one years (*e*) of any person who under the limitations aforesaid of real estate would be tenant in tail thereof by purchase to or in favour of the person or persons who would as aforesaid be entitled under the subsequent limitations according to the tenor of the same limitations.

Executory limitation over on death under 21 of any tenant in tail by purchase.

(*e*) See the note on p. 427.

AND (subject as aforesaid) as to the capital and income of the said trust fund UPON TRUST for such of my children living at my death and such of the issue then living of any child or children of mine dying in my lifetime as either before or after my death shall being males attain the age of twenty-one years or being females attain that age or be married under that age such children and other issue to take as tenants in common in a course of distribution according to the stocks the issue of a deceased child of mine taking by substitution as tenants in common the share only which their parent would if living at my death have taken.

Trust for children and for the issue *per stirpes* of such children by substitution.

UPON TRUST for the absolute use and benefit of the first person being of the age of twenty-one years who shall by virtue of my will become entitled whether as tenant for life or as tenant in tail [male] by purchase to the actual possession or to the receipt of the rents and profits of my settled estate [*or* the hereditaments hereinbefore devised in strict settlement].

Trust of residuary personal estate, or accumulated specific fund.

PROVIDED ALWAYS and I hereby direct and declare that the said James C. shall within six calendar months next after my death and his having actually entered into and taken possession of the said freehold manors hereditaments and premises and the said leasehold premises hereinbefore described to be situate in the county of D. or either of them or any part thereof respectively take upon himself the surname of S. only

Name and arms clause.

and shall thenceforth style and write himself in all letters deeds and instruments and upon all occasions whatsoever by that surname alone And shall also use and bear the arms of S. quartered as the same are now quartered used and borne by —— And if the said James C. shall refuse or fail to assume quarter use and bear such surname and arms within the period hereinbefore limited for that purpose or if the said James C. after having assumed quartered used or borne the said surname and arms shall afterwards discontinue to bear use and quarter the said surname and arms or any or either of them for the space of six calendar months Then and in any such case the estate and interest hereby devised and bequeathed to the said James C. in the said freehold and leasehold premises shall cease And the said freehold and leasehold premises shall thereupon go to and become vested in the said John C. his heirs executors administrators and assigns respectively but upon and subject to a condition or proviso similar as far as circumstances will permit to that which is hereby attached to the last-mentioned devise and bequest in favour of the said James C. And if the said John C. shall also refuse or fail to assume quarter use and bear such surname and arms within the period by the last-mentioned condition or proviso limited for that purpose or if the said John C. after having assumed quartered used or borne the said surname and arms shall afterwards discontinue to bear use and quarter the said surname and arms any or either of them for the space of six calendar months then and in any such case I direct and declare that the said freehold and leasehold premises shall go to and become vested in my nephew William C. his heirs executors administrators and assigns respectively for his and their own absolute use and benefit.

Gift over in default of compliance.

Name and arms clause.

Provided always that if the second or any other [younger] son of the said —— or any issue male of such second or other [younger] son shall become entitled to the family estate of —— and any younger son of the said —— or any issue male of his body entitled or inheritable under the aforesaid limitations or proviso shall be then living then and in such case

Shifting clause.

and as often as the same shall happen the uses originally or by virtue of the last proviso limited to the son who or whose issue shall so become entitled as aforesaid shall cease (*f*) But my will is that if by virtue of such proviso the said hereditaments shall have shifted from any younger son of the said —— or from his issue male and there shall afterwards be a failure of issue male of all the sons of the said —— younger than the son from whom or from whose issue male the same shall have so shifted as aforesaid Then and in that case the same hereditaments and premises shall return be and remain To the uses and be held in the manner to and in which the same would have gone and been held if the proviso for shifting the same had not been inserted in this my will.

Shifting clauses.

(*f*) See, as to shifting clauses, *Micklethwait* v. *Micklethwait*, 4 C. B. N. S. 790; 28 L. J. C. P. 121; *Biddulph* v. *Lees*, E. B. & E. 289; 28 L. J. Q. B. 211; *Turton* v. *Lambarde*, 1 D. F. & J. 495; 29 L. J. Ch. 361; 2 L. T. 38; *Walmesley* v. *Gerard*, 29 Be. 321; 30 L. J. Ch. 435. The operation of such a clause in a will is simply to accelerate the next remainder, and the person from whom the estate shifts is not deemed to be dead without issue, but he and his issue may take the estate under a subsequent limitation, *Jellicoe* v. *Gardiner*, 11 H. L. C. 323; 34 L. J. C. P. 282; 13 L. T. 127. See also *D'Eyncourt* v. *Gregory*, 34 Be. 36; 10 L. T. 317; *Lord Kenlis* v. *Earl of Bective*, 34 Be. 587; *Bagot* v. *Legge*, 34 L. J. Ch. 156; 10 L. T. 898; *Cope* v. *Earl de la Warr*, L. R. 8 Ch. 982; 42 L. J. Ch. 870; 29 L. T. 565; *Meyrick* v. *Laws*, L. R. 9 Ch. 237; 43 L. J. Ch. 521; 30 L. T. 77; *Miles* v. *Harford*, 12 Ch. D. 691; 41 L. T. 378. As to the words "except an eldest son" or "become the eldest son," see *Tuite* v. *Bermingham*, 7 H. L. 634; *Bathurst* v. *Errington*, 2 App. Cas. 698; 46 L. J. Ch. 748; 37 L. T. 338; *Reid* v. *Hoare*, 26 Ch. D. 363; 53 L. J. Ch. 486; 50 L. T. 257; *Domville* v. *Winnington*, 26 Ch. D. 382; 53 L. J. Ch. 782; 50 L. T. 519; *Shuttleworth* v. *Murray*, '01, 1 Ch. 819; 70 L. J. Ch. 453; 84 L. T. 605.

Power to trustees to lease real estate (*g*), subject to wife's right to occupy part.

I empower my trustees until the sale of my real estate (but without prejudice to the directions hereinbefore contained as to the occupation by my wife of part of my estates at ——) to let the same or any part or parts thereof from year to year or for any term or terms of years in possession at the best rent or rents without taking any fine or premium subject to such covenants and conditions as they shall think reasonable

Annual income of real

And I direct that the rents interest dividends and yearly produce of my real and residuary personal estate for the time

being unsold or unconverted (including the profits of my said business if carried on as aforesaid) shall be deemed annual income for the purposes of the trusts hereinbefore contained and be payable and applicable in the same or the like manner as the yearly produce of the trust fund aforesaid would if such fund were realised and invested be applicable.

and personal state till sale, and of trade, to be applied in the same way as income of trust fund.

(*g*) The Settled Land Act, 1882, Part IV., confers wide powers on the tenant for life of settled land of leasing for ordinary, or building, or mining purposes; and on a sale or grant for building purposes, or a building lease, sect. 16 of the Act gives to the tenant for life powers as to the dedication of parts of the land for streets, roads, paths, squares, gardens, or other open spaces, with sewers, &c. See also sect. 25 of the Act, and the Settled Estates Act, 1877. By the Trustee Act, 1893, s. 19, powers are conferred on the trustees of renewable leaseholds to renew the same, and to raise money to meet the fines on renewal.

Power to lend money to builders.

I EMPOWER my trustees to advance any sum or sums of money out of my residuary personal estate to any person or persons who shall contract to purchase or take on lease any part of the said trust premises for building purposes such advances respectively to be secured by way of mortgage or otherwise as my trustees shall deem sufficient.

Power to mortgage or sell, for enfranchising copyholds, or purchasing fee of leaseholds.

I EMPOWER my trustees by and out of the rents and profits of the said trust premises or by mortgaging or selling the same premises or any part thereof under the powers for such purposes hereinafter contained or either of them to enfranchise or purchase the fee simple of any copyhold or leasehold tenements forming part of the said trust premises and to cause the same to be settled and assured upon the trusts hereinbefore declared of and concerning the said trust premises.

Building land.

Special powers for its development.

I EMPOWER my trustees or trustee for the time being upon any such sale or sales lease or leases as are authorised by this my will or in contemplation thereof to enter into such covenants and to require such covenants to be entered into of a mutual character restrictive or otherwise for the better enjoyment of the lands sold and retained or of lands sold to different persons only as my trustees or trustee for the time being shall think proper And for the purposes of any streets or open spaces which they may lay out to pull down any

buildings standing on my said estates and to sell or use the materials thereof the moneys arising therefrom when received to be held upon and for the trusts and purposes herein expressed and declared of and concerning the moneys to arise from the sale of my said trust estates And for all or any of the purposes aforesaid to enter into make execute and concur in all such contracts conveyances and assurances as my trustees or trustee for the time being shall think proper and to alter vary or modify on terms or gratuitously any such contracts conveyances and assurances.

Proviso as to mortgages and costs of transfer.

I DECLARE that it shall be lawful for my trustees or trustee for the time being in the execution of the power of [*or* trust for] sale hereinbefore contained to sell my real estates either subject to or discharged from the mortgages affecting the same respectively and in case the said estates or any part thereof shall be sold discharged from the said mortgages then to apply a competent part of the money to arise from the sale of the same estates in or towards payment of the said mortgages respectively And that my trustees or trustee shall have full discretionary power and authority to take such measures and make such arrangements in relation to the said mortgages respectively either by paying off the same and taking transfers or assignments thereof or by obtaining advances from other persons upon transfers thereof or by way of indemnity or otherwise as shall be deemed necessary or convenient and to pay all costs charges and expenses incident to such measures or arrangements out of the capital moneys which shall come to their or his hands by virtue of this my will.

Deferred annuities to nephews, subject to prior limitations and annuity.

I DECLARE that from and after the death of the survivor of my wife and brother M. P. and the failure of the limitations hereinbefore contained in favour of my child or children and the issue of such child or children and subject and without prejudice to the annuity or yearly rent-charge of £—— hereinbefore limited to my nephew W. P. for his life my said hereditaments shall stand charged with the payment to each of my nephews [*names*] who for the time being shall not be beneficially entitled to the possession or the receipt of the rents issues and profits of my said hereditaments or any

part or share thereof under or by virtue of the limitations hereinbefore contained of an annuity or yearly rent-charge of £—— to be issuing out of my said hereditaments and to be payable until the death of such nephew or until he shall be so entitled as aforesaid whichever event shall first happen and to be paid in even portions half-yearly clear of all deductions except property tax if then payable and the first payment thereof (*h*) to be made at the end of six calendar months next after the death of the survivor of my wife and the said M. P. and the failure of the limitations hereinbefore contained in favour of my child or children and the issue of such child or children.

Period of annuities.

First payment.

(*h*) See *In re Bywater*, 18 Ch. D. 17, where deferred annuities were given, and the direction as to the first payment was inconsistent with the prior gift.

I EMPOWER my trustees notwithstanding the trust for sale hereinbefore contained to postpone for such period as they may deem advisable the sale of all or any of the policies of assurance on lives which may belong to me at my death [*or* the policies on the lives of A. of &c. B. of &c. and C. of &c.] and to pay the premiums on such policies respectively out of the annual income of my residuary estate and to receive in cash the bonuses already accrued or hereafter to accrue thereon respectively which when received shall be held and disposed of as part of the *corpus* of the moneys to arise from the sale of my residuary estate or to surrender such bonuses as aforesaid or any of them in consideration of a proportionate decrease in the said premiums respectively or to allow such bonuses to be added to the policy moneys and in a case of a sale or disposition of the said policies to sell or dispose of the same respectively either by way of surrender to the office in consideration of a gross sum of money or in consideration of new policies for sums to be agreed upon on the lives respectively assured payable on the dropping of such lives respectively but without premiums in the meantime.

Policies of assurance.

I EMPOWER my trustees [*or* the trustees or trustee for the time being of this my will] to apply all or any part of the

Maintenance.

income arising from the presumptive share of any child or issue of mine in any part of my property after the death of the preceding owner for life thereof if any for the maintenance (*i*) and education of each such child or issue And I direct my trustees [*or* the said trustees or trustee] to invest and accumulate the unapplied income in augmentation of the capital of such share I also authorise my trustees [*or* the said trustees or trustee] to apply but with the consent of the life owner if any for the time being any part not exceeding one-half of the presumptive or vested share of any person under this my will for his or her advancement in the world And I empower my trustees [*or* the said trustees or trustee] for the purposes aforesaid to pay such income or the money so to be raised unto the parent or guardian for the time being of any such minor as aforesaid without being in anywise answerable for the application thereof.

Advancement.

Payment to parent or guardian.

(*i*) Notwithstanding section 43 of the Conveyancing Act, which provides for the application by trustees of the income of property held by them in trust for an infant for the maintenance, education, or benefit of the infant and accumulation of surplus income, clauses providing for these objects will be required if the vesting is limited to take place after the age of twenty-one years, or where the whole income is subject to a prior trust for accumulation, or where the income would not go with the capital. See notes to sect. 43 in Wolstenholme and Brinton's Conv. Acts.

Advancement.

I DIRECT that my trustees with the consent of my wife if she be living and after her death in their own discretion may advance for the benefit of each of my children a moiety or less of such child's expectant share.

Trustee to determine the value of the share of each beneficiary.

I DECLARE that in order to render the power of advancement hereinbefore contained available in respect of the share of each or any child grandchild or other issue of the said A. B. of and in the said hereditaments and premises hereinbefore devised before the sale of the whole thereof it shall be lawful for my said trustees or trustee with such consent or in such discretion as aforesaid to determine the value of such share and to raise the whole or any part of such value by exercising the powers of mortgaging and charging hereinafter contained

and to apply the money to be so raised pursuant to the power of advancement hereinbefore contained but so that the total amount of the money to be applied for the advancement of any one such child grandchild or other issue shall not in the opinion of my said trustees or trustee exceed one-half of the value of his or her vested or presumptive share of the said trust fund.

Power of appropriation towards share.

I EMPOWER my trustees at any time or times in their discretion to appropriate any part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of any share in my residuary estate and for that purpose to determine the value of such residuary estate or any part or parts thereof in any manner they think fit.

Maintenance by a percentage on portions.

AND I DIRECT that the trustees or trustee for the time being of the same term shall raise and apply for the maintenance and education of my child or children presumptively entitled to a portion or portions under the said settlement and this my will interest upon their respective portions in manner following that is to say for each son under the age of twelve years interest after the rate of one per cent. per annum for each son above the age of twelve years and under the age of sixteen years two per cent. per annum and for each son above the age of sixteen years three per cent. per annum and for each daughter under the age of twelve years one per cent. per annum and for each daughter above the age of twelve years three per cent. per annum until their respective portions shall become vested or they respectively shall previously die.

Advancements in testator's lifetime to be brought into account.

I DECLARE that the sum of £—— which I have applied for the benefit of my said son —— shall be taken as a satisfaction to that extent of the portion provided for him by my will and further that all other advances which I may hereafter make for the benefit of any of my children to the amount at any one time of £—— shall be in part satisfaction of the portions hereby provided for them.

Investment of trust moneys.

I DIRECT that all investments of trust money under the trusts or provisions of this my will shall be made by my

general direction as to.

trustees or trustee in their or his names or name in or upon some one or more of the investments or securities following that is to say the public stocks or funds or government securities of the United Kingdom freehold copyhold or leasehold securities in England Wales or Ireland such leaseholds if for years having not less than sixty years unexpired at the time of the investment thereon and the stocks funds shares debentures debenture-stock mortgages or securities of any corporation company or body municipal commercial or otherwise in the United Kingdom or India or any colony or dependency of the United Kingdom AND I DECLARE that my trustees or trustee may from time to time vary or transpose such stocks funds shares and securities into or for any other or others of the kinds aforesaid NEVERTHELESS I direct that where any person shall be entitled to receive as owner for life the income of the said trust moneys when invested the investment shall not be made or varied without the previous consent in writing of such person.

Marriage to be with consent of parents or guardians.

I DECLARE that the marriage after my death of any and every infant female beneficiary under this my will in order that her interest under the trusts hereinbefore declared may vest on such marriage shall be solemnised with the prior consent in writing of the parents or parent guardians or guardian for the time being of such infant.

Land till sold to be considered as money.

I FURTHER DECLARE that in the meantime until the sale of the real estate hereinbefore devised the same shall for the purposes of all the trusts and provisions hereinbefore contained in favour of my children and issue be considered as money or personal estate and be transmissible accordingly

Rents and profits till sale.

and the rents and profits thereof shall be received by the trustees or trustee for the time being of this my will and be applicable to the same purposes and in the same manner as the yearly produce of the moneys stocks funds or securities to be produced by the sale thereof would be applicable by virtue of this my will if such sale had actually taken place and the proceeds thereof had been duly invested pursuant to the provisions of this my will.

I DECLARE that the provision hereby made for my wife is intended to be in satisfaction of the jointure to which she will be entitled after my death by virtue of the settlement made upon our marriage and that the said provision is made upon condition that she do at the request of my trustees or trustee but at the cost of my estate effectually release the hereditaments charged with the said jointure from all claims and demands in respect thereof. Provision in satisfaction of wife's jointure.

I SUBJECT the accruing shares of each of my daughters under the trusts of this my will to all the trusts herein contained concerning the original sum of £—— hereby given to or in trust for each daughter inclusive of this clause. Accruing shares, general direction as to.

I EMPOWER my trustees notwithstanding anything hereinbefore contained at their discretion to continue all or any part of my personal estate in the state or upon the investments in or upon which the same shall be at the time of my death however doubtful or hazardous (*l*) or limited the description or nature of the property or investment may be or otherwise to call in and compel payment to sell and dispose of the same and to lay out and invest the moneys to be thereby raised and all other moneys to be from time to time received by them under the trusts or powers herein declared and contained in their names in some authorised trust investment or investments which investment or investments so to be made by my trustees and the annual income thereof shall be held under and subject to the same trusts as the trust premises for which the same shall be substituted were or would have been liable to under this my will. Power to postpone conversion of hazardous investments. Investment.

(*l*) This power is necessary in the case of a testator who leaves shares or other speculative property which at the time of his death may be at a low price or almost unsaleable in the market, but as to which reasonable expectation may be entertained of an increase in value. If no such power is introduced, the executors must realise the depreciated investments within twelve calendar months after the testator's death, see *Hughes* v. *Empson*, 22 Be. 181; *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; 37 L. J. Ch. 550; 18 L. T. 494; *Marsden* v. *Kent*, 5 Ch. D. 598; 46 L. J. Ch. 497; 37 L. T. 49. Shares and other speculative property.

I EMPOWER my trustees to accept the surrender of any lease or otherwise to discharge any tenant of the said trust premises General powers of management.

and to compound or allow time for the payment of or absolutely to abandon and release any arrear of rents or any debts due to my estate and to satisfy or settle all demands against my estate whether supported by strictly legal evidence and whether barred by any statutory or other limitation or not and to refer any matter in difference relating to my estate to arbitration and generally to settle and determine all accounts and disputes relating to my estate in such manner and on such terms as my trustees shall deem expedient And I empower my trustees to employ such agents collectors of rents and debts and other persons in and about the management of the said trust premises respectively and to pay them such salaries and remuneration as my trustees shall think fit.

Condition not to dispute will.

I declare that if the said A. B. or any person in his name or on his behalf or any person claiming through under or in trust for him shall at any time during the life of the said A. B. or within twenty-one years after his death dispute the validity of this my will (*n*) or of any of the dispositions herein or in any codicil hereto contained or if the said A. B. or any such person as aforesaid shall at any time during such period as aforesaid refuse to confirm this my will or any codicil hereto or to do such acts and things as of the said A. B. or such person as aforesaid can be reasonably demanded for giving full effect to all or any of such dispositions or if any proceeding whatsoever shall at any time during such period as aforesaid be taken with the consent or connivance of the said A. B. or any such person as aforesaid by means or in consequence of which any estate or interest could be in any way attainable by the said A. B. or any person in his right of larger extent or value than is or shall be by this my will or any codicil hereto given to the said A. B. and such proceeding shall not be formally and at once disavowed stayed or resisted by the said A. B. to the full extent of his power and ability to do so Then and in any such case all the dispositions herein or in any codicil hereto contained in favour of the said A. B. shall cease and be void to all intents and purposes whatsoever and are hereby revoked accordingly And

(in the event lastly hereinbefore contemplated) as to all the real estates so forfeited as aforesaid I GIVE and devise the same unto the said P. and Q. [*trustees of will*] to hold in the same manner and subject to the same trusts powers provisoes and limitations as are herein declared provided and limited of or concerning my residuary real estate AND as to all the personal estate so forfeited as aforesaid I GIVE and bequeath the same unto Z. his executors administrators and assigns absolutely.

Condition not to dispute validity of will.

(*n*) In reference to conditions of this class, which are often found in wills, but the validity of which has been a good deal questioned, it may be observed that there is no principle of law which forbids the divesting of an estate or interest taken under a will in the event of the devisee or legatee disputing its validity on the ground of the testator's incompetency to make it, by reason of insanity or any other disability, *Cooke* v. *Cholmondeley*, 2 M'N. & G. 18; 19 L. J. Ch. 81; 86 R. R. 7; which decision was approved in *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1; 43 L. J. P. C. 58; 31 L. T. 105. Such a condition, attached to a gift of personalty, will be ineffectual without a gift over in the event of non-compliance with the condition; see Jarm. Wills, 902. A gift over will not give effect to a condition in itself illegal; but a legal condition appended to the enjoyment of real estate will not be rendered ineffectual by the absence of such a gift.

Clause negativing the operation of Locke King's Act.

I DECLARE that the provisions of the Act of Parliament 17 & 18 Vict. c. 113 entitled "An Act to amend the Law relating to the Administration of the Estates of deceased Persons" or of any Act explanatory thereof shall not be applicable to the administration of my estate (*o*) my intention being that the several devisees of my real estate shall take the same exonerated from any mortgage debts or debt which at the time of my death may affect the said real estate or any part thereof.

(*o*) See note (*a*), Prec. XVI.

Clauses negativing apportionment of rents, &c., current at death

I DECLARE that no apportionment shall take place of rents of any of my real estate which shall be current or accruing at the time of my death (*p*).

(*p*) See the note on apportionment, note (*g*), Prec. VIII.

I DECLARE that as between the several devisees and specific legatees under this my will on the one hand and my executors

on the other hand there shall not be any apportionment of rents dividends or other periodical payments current at the time of my death.

I DECLARE that as between the capital and income of my estate rents dividends or other periodical payments current at the time of my death (except interest on money lent) shall not be apportionable.

Mutual wills (*q*).

I Mary Johnson of Sheffield spinster by this my will made this —— day of —— 19— give all my realty and personalty to my sister Jane Johnson whom I appoint my executor In witness &c.

I Jane Johnson of Liverpool spinster by this my will made this —— day of —— 19— give all my realty and personalty to my sister Mary Johnson whom I appoint my executor In witness &c.

Mutual wills, mistake.

(*q*) Where two sisters wished to make mutual wills, each to give all her property to the other, so that the survivor might be entitled to all the property of both, but by mistake each signed the will intended for the signature for the other, and the mistake was not discovered till after the death of one, it was held that the deceased had died intestate, *Re* ——, 14 Jur. 402. The same thing occurred again in *In b. Hunt*, L. R. 3 P. & D. 250; 44 L. J. P. 43; 33 L. T. 321.

Mutual wills and joint wills.

Mutual wills, *i.e.* separate instruments made by two persons in favour of each other (see *Hinckley* v. *Simmons*, 4 Ves. 160), must not be confounded with a joint will, *i.e.* a single instrument made by two persons, and intended by them to operate as the will of both. The term "mutual will" is sometimes applied to the latter kind of instrument; but the law of this country does not recognise such a document as a will, *Hobson* v. *Blackburn*, 1 Add. 274; and see Deane, Wills, 21; though it may be valid in equity as a contract, *Dufour* v. *Pereira*, 1 Dick. 419. As to the binding nature of an agreement to make mutual wills, see *Stone* v. *Hoskins*, '05, P. 194; 74 L. J. P. 110; 93 T. T. 441.

See also *Price* v. *Dewhurst*, 4 M. & C. 76; 8 L. J. Ch. 57; *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; 4 R. R. 38. Where two joint tenants agreed to make, and did make, mutual wills, each in favour of the other for life, this effected a severance of the joint tenancy, *In re Wilford's Estate*, 11 Ch. D. 267; 48 L. J. Ch. 243.

Agreement to leave property by will, enforced.

A will cannot be made irrevocable, "for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable," see *Vynior's Case*, 8 Rep. 82. But that an agreement to leave property by will may be enforced, see *Loffus* v. *Maw*, 3 Gif. 592; 6 L. T. 346; approved in *Coles* v. *Pilkington*, L. R. 19 Eq.

174; 44 L. J. Ch. 381; 31 L. T. 423; *Ridley* v. *Ridley*, 34 Be. 478; 34 L. J. Ch. 462; 12 L. T. 481; and that an agreement to settle all the property to which a person may be entitled at his death can be enforced, see *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; 42 L. J. Ch. 118; 27 L. T. 646.

Survivorship, evidence of, required, when deaths by same calamity.

Where a person dies possessed of real or personal estate, the heir-at-law or the next of kin respectively is entitled, unless the property can be shown to have passed to another by a valid and effectual disposition or by survivorship. Thus where husband and wife are drowned in the same shipwreck, in the absence of any evidence of survivorship, the next of kin of the husband is not entitled to the wife's property, *Satterthwaite* v. *Powell*, 1 Cur. 705. See also *Scrutton* v. *Pattillo*, L. R. 19 Eq. 369; 44 L. J. Ch. 249; 32 L. T. 140; *Wollaston* v. *Berkeley*, 2 Ch. D. 213; 45 L. J. Ch. 772; 34 L. T. 171. Where husband and wife, after executing mutual wills, each for the benefit of the other, were both swept into the sea by the same wave, and neither was again seen, the Court, rejecting all speculations arising from sex, strength, or age, held that there was no evidence of survivorship, and in the absence of such evidence would not presume survivorship, *Wing* v. *Angrave*, 8 H. L. C. 183; 30 L. J. Ch. 65; *In b. Alston*, '92, P. 142; 61 L. J. P. 92; 66 L. T. 591; and see *Barnett* v. *Tugwell*, 31 Be. 232. See also as to survivorship, *Rex* v. *Dr. Hay* (*General Stanwix's Case*), 1 W. Bl. 640; Fearne's Posth. Works, 38; 1 Taylor, Evidence, 197; *Ommaney* v. *Stilwell*, 23 Be. 328; *In b. Wainwright*, 1 Sw. & Tr. 257; 28 L. J. P. 2; *In b. Ewart*, 1 Sw. & Tr. 258; *In b. Peck*, 2 Sw. & Tr. 506; *In b. Smith*, 2 Sw. & T. R. 508; 31 L. J. P. 182; 7 L. T. 193; *In b. Beynon*, '01, P. 141; 70 L. J. P. 31; 84 L. T. 271. Where a testator and his residuary legatee are drowned at the same time, the legacy does not take effect; and the executor having renounced, administration was granted as in case of an intestacy, *In b. Carmichael*, 4 Sw. & Tr. 224; 32 L. J. P. 70. Persons claiming property as next of kin to a deceased intestate, and showing their kindred, are entitled, in the absence of evidence that a person dead and nearer of kin to the intestate survived him; the onus rests on those claiming through a deceased nearer of kin to the intestate to show that such deceased survived the intestate, *Re Green's Settlements*, L. R. 1 Eq. 288; 35 L. J. Ch. 252; 13 L. T. 541.

Presumption as to continuance of life.

There is no absolute presumption of law as to the continuance of life, *Lapsley* v. *Grierson*, 1 H. L. C. 498. If a person has not been heard of for seven years, the presumption is that he is dead, *Doe* v. *Jesson*, 6 Ea. 80; 17 R. R. 292; *Ommaney* v. *Stilwell*, 23 Be. 332; *In b. Turner*, 3 Sw. & Tr. 476; 33 L. J. P. 180; but see *Watson* v. *England*, 14 Sim. 28; 74 R. R. 1; *Re Creed*, 1 Drew. 235; *Bowden* v. *Henderson*, 2 S. & G. 360; but he cannot be presumed to have died at any particular period during the seven years, for the presumption of law relates only to the fact of death: the time, when material, must be a subject of proof, *Doe* v. *Nepean*, 5 B. & Ad. 86; 2 M. & W. 894; and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment

of which that fact is essential, *Re Phene's Trusts*, L. R. 5 Ch. 139; 39 L. J. Ch. 316; 22 L. T. 111; *Re Lewes' Trusts*, L. R. 6 Ch. 356; 40 L. J. Ch. 602; 24 L. T. 533; *Hickman* v. *Upsall*, L. R. 20 Eq. 136. See also *Re Walker*, L. R. 7 Ch. 120; 41 L. J. Ch. 219; 25 L. T. 775; *In b. Nicholls*, L. R. 2 P. & D. 461; 41 L. J. P. 88; 27 L. T. 323; *Re Corbishley's Trusts*, 14 Ch. D. 846; 49 L. J. Ch. 266; *In re Rhodes*, 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652. The fullest evidence procurable must be laid before the Court in these cases, *In b. Clarke*, '96, P. 287; 66 L. J. P. 9.

Death at sea. As to the presumption of death at sea, see *In b. Norris*, 1 Sw. & Tr. 6; 27 L. J. P. 4; where A. sailed from Nelson (New Zealand) in a vessel bound for Sydney; the vessel never reached Sydney, and after inquiry made, no intelligence could be obtained as to the vessel or any of those on board; it was held that the death of A. was to be presumed. The payment by underwriters of a policy of insurance on the vessel is strong evidence in favour of such presumption, *In b. Main*, 1 Sw. & Tr. 11; 27 L. J. P. 5; *In b. Bishop*, 1 Sw. & Tr. 303; 28 L. J. P. 93. And as to the presumption arising from non-application for an annuity or dividends on stock, see *Re Beasney's Trusts*, L. R. 7 Eq. 498; 38 L. J. Ch. 159; 19 L. T. 630.

44 & 45 Vict. c. 47. It is to be regretted that the English statute book contains no Act corresponding with the Presumption of Life Limitation (Scotland) Act, 1881.

Testimonium clauses; —will on one sheet of paper. In WITNESS whereof I have hereunto set my hand this —— day of —— 19—.

In WITNESS whereof I have hereunto set my hand and seal this —— day of —— 19—.

—will on several sheets. In WITNESS whereof I have signed my name at the end of this my will contained in this and the preceding [*four*] sheets of paper this —— day of —— 19—.

—will executed in duplicate. In WITNESS whereof I have to this my will contained in —— sheets of paper and also to a duplicate hereof set my hand this —— day of —— 19—.

—acknowledgment of signature by testator. In WITNESS whereof I have in the presence of the two subscribing witnesses acknowledged as my signature the signature at the end of this my will contained in this and the [*four*] preceding sheets of paper the day and the year first hereinbefore written.

—signature by amanuensis. In WITNESS whereof E. F. of &c. has in my presence and by my direction and in the presence of the two subscribing

witnesses signed my name at the end of this my will contained in this and the [*four*] preceding sheets of paper this —— day of —— 19—.

SIGNED by A. B. in our presence and by us in his presence (*r*). Attestation clauses.

C. D.
E. F.

(*r*) No particular form of attestation is necessary: this short form shows a compliance with all the essential requirements of the 9th section of the Act.

SIGNED by A. B. of &c. gentleman as and for his last will and testament in the presence of us together present at the same time who in his presence at his request and in the presence of each other have subscribed our names as attesting witnesses.

T. B. of —— Solicitor.
H. B. of —— Merchant.

WE the undersigned have attested the execution of the foregoing writing by A. B. of &c. signing his name thereto as his last will in the sight and presence of us present at the same time and without quitting his sight or presence we subscribe the same in the presence of each other the alterations opposite to which respectively our initials are placed in the margin having been first made. —signature by testator himself.

WE the undersigned have attested the execution of the foregoing writing by A. B. of &c. acknowledging as his signature the signature at the end thereof in the sight and presence of us together present at the same time and we in his sight and presence at his request and in the presence of each other subscribe our names as witnesses. —acknowledgment of signature by testator.

WE the undersigned have attested the execution of the foregoing writing by E. F. of &c. signing the name of A. B. of &c. at the end thereof in his sight and presence and by his direction and in the sight and presence of us together present at the same time [and the said A. B. after the signature had been so made as aforesaid having acknowledged the same —signature by amanuensis.

signature to be his signature in our presence both of us being present at the same time now] we in the sight and presence of the said A. B. at his request and in the presence of each other subscribe our names as attesting witnesses (*s*).

(*s*) The words enclosed within brackets in the above form of attestation did not appear in former editions, nor, in my opinion, are they necessary, upon what I conceive to be the true reading of sect. 9 of the Wills Act. Their use, however, *ex abundanti cautelâ* is recommended in consequence of a District Probate Registrar having taken exception to the form as it stood in previous editions.—J. B. M.

Memorandum and attestation of alterations, on same paper as will.

MEMORANDUM that the interlineation between the —— and —— lines in the —— page of this my will and the alteration in the —— line of the —— page thereof and the obliteration in the —— line of the same page were made according to my desire As WITNESS my hand the —— day of —— 19—.

[Signed] A. B.

Signed by the said A. B. in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names.

C. D. of &c.
E. F. of &c.

Marginal alteration.

FOR the words "————" through which I A. B. have drawn my pen [*or* which I have caused to be erased] it is my will that the words "————" be substituted and inserted.

[Signed] A. B.

Signed &c. [*as in last precedent*].

Memorandum of alterations, interlineations, and re-execution.

I A. B. have made in my own handwriting [*or* have caused to be made] in this my will the alterations hereinafter specified that is to say in the —— line from the top of the —— page the words "————" are erased and the words "————" are inserted in their stead The words "————" in the —— line from the bottom of the —— page and the —— and —— lines from the bottom of the same page are erased Between the words "————" and "————" in the —— line from the top of the ——

page the words " ——— " are inserted I DECLARE the above writing so altered to be my will.

[Signed] A. B.

Signed &c. [*as in last precedent*].

Revocations of wills (*t*).

I A. B. of —— do hereby REVOKE my will of the —— day of —— 19—.

[Signed] A. B.

Signed &c. [*as in last precedent*].

(*t*) Neither of these revocations would be entitled to *probate;* but letters of administration will be granted with the memorandum annexed.

I —— of —— do hereby revoke all the dispositions of my property contained in an instrument bearing date the —— day of —— 19— and purporting to be my last will which instrument I at the time of the execution thereof deposited with Messrs. —— of —— Solicitors.

[Signed] A. B.

Signed &c. [*as in last precedent*].

Revival of will revoked by marriage; —on a separate paper.

WHEREAS I A. B. of —— made my will on the —— day of —— 19— and have since intermarried with —— I hereby revive and confirm the said will this —— day of —— 19—.

[Signed] A. B.

Signed &c. [*as in last precedent*].

Revival of will; —on same paper with the will.

I A. B. of &c. hereby confirm the above will this —— day of —— 19—.

[Signed] A. B.

Signed by the said A. B. of &c. in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names and such signature by the said A. B. and by us as witnesses took place between one and two o'clock in the afternoon of Monday the —— day of —— 19— after (*u*) the solemnization on that day of the ceremony of marriage between the said A. B. and Mary now his wife.

J. K. of &c.
L. M. of &c.

(*u*) See note (*m*) to sect. 18 of the Wills Act, *ante*, p. 38.

Codicil made after marriage.

THIS IS A CODICIL to the will of me —— which will bears date the —— day of —— 19— WHEREAS since the date of the said will I have intermarried with —— NOW I HEREBY give to my wife for her life the annual sum of £—— to commence from the day of my death and to be paid to her by equal half-yearly payments and I declare that my children by her shall participate equally with my other children in my general real and personal estate according to the trusts of my will IN all other respects I CONFIRM the said will Dated this —— day of —— 19—.

Codicil reviving a will previously revoked.

WHEREAS I A. B. of —— made my will dated the —— day of —— 19— and have since revoked the same Now I hereby ANNUL such revocation and DECLARE that the said will is valid and subsisting Dated this —— day of —— 19—.

Codicil.

A CODICIL to the will dated the —— day of —— 19— of me A. B. of &c. My son W. having since the date of my said will died without leaving issue I DIRECT that the property comprised in the specific and pecuniary devises and bequests contained in my said will to or in favour of my said son W. shall fall into my residuary estate AND that my said will shall take effect as if in the residuary devise and bequest (*x*) therein contained the names of my two children T. and H. were substituted for the names of my three children the said W. T. and H. I CONFIRM my said will in all other respects Dated this —— day of —— 19—.

(*x*) In this case, if the testator, who had by his will given his residuary real and personal estate equally amongst his three sons *by name*, had died without making this codicil, the death, in his lifetime, of one of the three sons, without leaving issue who survive the testator, would have caused an intestacy as to one-third of the residue.

# APPENDIX.

## I.

THE following enactment is not repealed by the Wills Act, 1 Vict. c. 26.

12 Car. 2, c. 24.

Fathers may dispose of custody of infants by deed or will.

TESTAMENTARY GUARDIANS: The 12 Car. 2, c. 24, s. 8 (see *ante*, p. 261), enacts, "That where any person hath or shall have any child or children under the age of twenty-one years and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mère* [*or whether such father be within the age of twenty-one years, or of full age*], by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time, to any person or persons in possession or remainder, other than popish recusants; and that such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter [*i.e.* after 1660] to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise: And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children."

The 9th section enacts, "That such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his

12 Car. 2, c. 24. Management of lands and personal estate of infants by their guardians.

or their custody, to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children; and also the custody, tuition and management of the goods, chattels and personal estate of such child or children, till their respective age of twenty-one years, or any lesser time, according to such disposition aforesaid; and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do."

But sect. 10 provides, "That this Act, or anything therein contained, shall not extend to alter or prejudice the custom of the City of London, nor of any other city or town corporate, or of the town of Berwick-upon-Tweed, concerning orphans; nor to discharge any apprentice from his apprenticeship."

These enactments remain in force, except as to the italicised passage in brackets in sect. 8.

See also the Guardianship of Infants Act, 1886 (*ante*, p. 261).

# II.

## ON DOMICILE.

Personalty governed by *lex domicilii*.

Realty by *lex loci rei sitæ*.

THE law of movables follows the law of the owner's domicile (*mobilia sequuntur personam*). The law of immovables is that of the country in which the property is situate (*lex loci rei sitæ*). A will disposing of real estate must therefore be executed with the forms required by the law of the country in which such estate is situate, and this applies equally to the disposition of leaseholds for years situated in England, *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; and see *Duncan* v. *Lawson*, 41 Ch. D. 394; 58 L. J. Ch. 502; 60 L. T. 732; *Pepin* v. *Bruyère*, '02, 1 Ch. 24; 71 L. J. Ch. 39; 85 L. T. 461; *In re Grassi*, '05, 1 Ch. 584; 74 L. J. Ch. 341; 92 L. T. 455; and Jarman, Wills, 2.

Domicile and allegiance, distinct.

Domicile is distinct from allegiance. Every person at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political status, and becomes subject to the law of domicile, which determines his civil status. There is the same distinction between allegiance and domicile as between *patria* and *domicilium*. Though a man may change his domicile as often as he pleases, he could not, until recently, cast off his natural allegiance; but see now, as to voluntary expatriation, the Naturalization Act, 1870 (33 & 34 Vict. c. 14, s. 6).

By the Roman law a man might be without a domicile (see J. G. Phil., Prin. Jurisp. 164); but the English law considers every person as domiciled somewhere or other.

Domicile, of three kinds.

Domicile is of three kinds: 1. Of birth or origin; 2. By operation of law; 3. Of choice (R. Phil. Dom. 13; see also Sto. Conf. Laws, ch. 3; Westlake, Intern. Law, Ch. 3).

There is no such thing as a domicile arising from society and not from connection with a locality, *Re Tootal's Trusts*, 23 Ch. D. 532; 52 L. J. Ch. 664; 48 L. T. 816, where an English testator living in Shanghai, but not domiciled in China, and whose will was proved in Her late Majesty's Supreme Court of China and Japan at Shanghai, which had jurisdiction over British subjects in China, was held to have died domiciled in England, there being no such thing as an Anglo-Chinese domicile. See also *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431; 57 L. J. P. C. 88; 59 L. T. 106.

**Domicile.**

"Domicile" answers very much to the common meaning of our word "home," and where a person possesses two residences, the phrase "he made the latter his home," would point out the latter to be his domicile (Phil. Dom. 13).

1. Domicile of birth or origin—

Domicile of origin.

The domicile of origin is that arising from a man's birth and connections. It is involuntary, the creation of law, not of the person.

The law attributes to every child, as soon as he is born, the domicile of his father if the child be legitimate, of his mother if the child be illegitimate.

If a child is born while its parents are on a journey, or temporarily absent from home, the parent's domicile, and not the accidental place of birth, is the domicile of the child; Phil. Dom. 25; *Firebrace* v. *Firebrace*, 4 P. D. 63, 66; 47 L. J. P. 41; 39 L. T. 94.

Domicile of origin revives and exists whenever there is no other domicile. It may be extinguished by act of law, but cannot be destroyed by the will or act of the man himself, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

2. Domicile by operation of law—

Domicile by operation of law.

This head comprises those who are under the control, and to whom the law gives the domicile, of another, and those on whom the State fixes a domicile. For example—The wife's

Wife.

domicile is that of her husband, Phil. Dom. 27–36; Westlake, Intern. Law, 325; *Dalhousie* v. *M'Doudall*, 7 C. & F. 817; *Bremer* v *Freeman*, 10 Moo. P. C. 306; *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J. P. 34; 1 L. T. 194; and this is the case, even though they are living apart, *Warrender* v. *Warrender*, 2 C. & F. 488; *Whitcomb* v. *Whitcomb*, 2 Cur. 351; *Re Daly's Settlement*, 25 Be. 456; 27 L. J. Ch. 751. After the death of her husband, the widow retains his domicile until she acquires another, *Gout* v. *Zimmermann*, 5 No. Cas. 440. A divorced woman, *Williams* v. *Dormer*, 2 Rob. 505, and also, it is conceived, one judicially separated from her husband (since by 20 & 21 Vict. c. 85, s. 7, a judicial separation has "the same force and the same consequences as a divorce *a mensâ et thoro*"; but see *Dolphin* v. *Robins*, 7 H. L. C. 390), has the option of taking a new domicile, but until she exercises this option, her marital domicile is not changed, see *Warrender* v. *Warrender*, *ubi sup.* As to whether a wife who is deserted by her husband can acquire

a domicile of her own, see *Le Sueur* v. *Le Sueur*, 1 P. D. 139; 45 L. J. P. 73; 34 L. T. 511.

Lunatic husband.

But it would seem that if the husband is a lunatic, and the wife is appointed his guardian, she may choose her own, and change her husband's domicile.

Minor.

The domicile of a legitimate unemancipated minor is that of the father, or of the mother during widowhood, or (though this is disputed) of the guardian Phil. Dom. 37–54; Westlake, Intern. Law, 323. Of his own accord a minor cannot change his domicile, *Somerville* v. *Somerville*, 5 Ves. 787; 5 R. R. 161; but if the mother acquire a new domicile (as by a second marriage), it is usually communicated to an infant residing with her, *Potinger* v. *Wightman*, 3 Mer. 67; 17 R. R. 20; *Johnstone* v. *Beattie*, 10 C. & F. 138, but not necessarily. The mother on her second marriage may abstain from changing the domicile of her infant children, *In re Beaumont*, '93, 3 Ch. 490; and it has been said that the guardian also has the power of changing the domicile of his ward, provided it be done *sine malâ fide*, see 3 Mer. 80; Westlake, Intern. Law, 324; see also *Stuart* v. *Moore*, 4 Macq. 1; 9 W. R. 722; *Stuart* v. *Marquis of Bute*, 9 H.L.C. 440; though this power of the guardian is doubtful, *Douglas* v. *Douglas*, L. R. 12 Eq. 617; 41 L. J. Ch. 74; 25 L. T. 530. A legacy bequeathed to an infant domiciled abroad may be paid when the infant becomes of age by the law of England or of the place of domicile, whichever first happens; and in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicile the guardian of the infant is entitled to receive the legacy, *Re Hellman's Will*, L. R. 2 Eq. 363.

Emancipation of minor.

Marriage emancipates a minor, and gives him the power of choosing a new domicile; so by accepting an office from which he is not removable, or by entering into a house of commerce with the consent of those under whose control he is, a minor becomes emancipated, and capable of acquiring a domicile of his own. But, for a complete and perfect emancipation, the relation contracted by the minor must be one which wholly and permanently excludes the parental control, *Rex* v *Wilmington*, 5 B. & Al. 525. A soldier or marine is emancipated by his entry into the service of the Crown; but in such a case the parental authority is suspended only, not destroyed, and if the service of the Crown should cease before the age of twenty-one is attained, the parental control revives, *Rex* v. *Walpole St. Peter's*, cited in *Rex* v *Woburn*, 8 T. R. 479; *Rex* v. *Rotherfield Greys*, 1 B. & C. 345. But voluntary entrance into a local militia, *Reg.* v. *Scammonden*, 8 Q. B. 349; 15 L. J. M. C. 30; or a police force, *Reg.* v. *Selborne*, 29 L. J.

**Domicile.**

M. C. 56; 1 L. T. 8; or the service of the captain of a merchant ship, *Rex* v. *Lytchet Matraverse*, 7 B. & C. 226, does not emancipate a minor.

Posthumous, illegitimate, or of unknown parents.

The domicile of a posthumous, or of an illegitimate, minor is that of the mother; if the parents are unknown, it is the place of birth or discovery of the child, Westlake, Intern. Law, 324.

Student.

One who sojourns in a particular place for the purpose of prosecuting his studies does not acquire a domicile in that place, Phil. Dom. 54.

Lunatic.

It would seem that the domicile of the guardian or committee of a lunatic determines the domicile of the lunatic, *ib.* 54–57; but see *contrà*, Westlake, 325. And see *Re Sottomaior*, L. R. 9 Ch. 677. As to the effect of a change of the father's domicile, upon the question of domicile of a lunatic son, see *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; 38 L. J. P. 17; 20 L. T. 41, in which case the son was of unsound mind throughout the whole of his majority.

Servant.

As a general rule, a domestic servant preserves the domicile which he possessed before entering into service; but this is a question depending upon the particular circumstances of each case, Phil. 57–60; and *à fortiori* in any other kind of service the circumstances must be taken into account as criteria of the *animus manendi*.

Public officer.

The holder of an office of a temporary and revocable nature does not change his original domicile, *Attorney-General* v. *Rowe*, 1 H. & C. 31; but if the office be not revocable, and its duties necessitate residence in a particular place, then the holder of such office acquires a domicile at that place, Phil. 61–79. The residence required must, however, be constant, and not occasional merely, *Somerville* v. *Somerville*, 5 Ves. 750; 5 R. R. 155.

Military or naval officer.

Thus the civil and military officers of the late E. I. C. acquired an Indian domicile, *Munroe* v. *Douglas*, 5 Mad. 404; *Bruce* v. *Bruce*, 6 Br. P. 566; 2 B. & P. 229 n.; *Craigie* v. *Lewin*, 3 Cur. 435; *Hepburn* v. *Skirving*, 9 W. R. 764; but the domicile of an officer in the general service of the Crown is unchanged by his serving in foreign parts, Phil. 78, 79; *Attorney-General* v. *Pottinger*, 6 H. & N. 733; 9 W. R. 578; and this applies to an acquired domicile as well as to a domicile of origin, *In re Macreight*, 30 Ch. D. 165; 55 L. J. Ch. 28; 53 L. T. 146. And in the case of an officer, in the service either of the Crown or of the E.I.C., absent on furlough, and many years resident abroad, the presumption of law was against the acquisition of a foreign domicile, *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285. But the presumption, raised by the continuing on half-pay in the navy, against a change

of domicile may be rebutted, *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730. **Domicile.**

Persons who enter the military service of a foreign state acquire a domicile in that state, *Ommaney* v. *Bingham*, before H. of L., 18th March, 1796; see 5 Ves. 757; but (as between the different countries which together constitute the United Kingdom) it seems that subjects of the King do not, by entering the service of the Crown, acquire an English domicile, but retain their domicile of origin. Thus, a domiciled Irishman by entering the Royal Artillery, *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J. P. 34; 1 L. T. 194; and a Jerseyman by entering the Royal Navy, *In b. Patten*, 6 Jur. N. S. 151, did not acquire a domicile in England. See also *Re Mitchell*, 13 Q. B. D. 418; 53 L. J. Ch. 1067; 51 L. T. 447, where these cases were approved and followed.

An ambassador preserves the domicile of the country which he represents and to which he belongs, and this privilege extends to those resident with him, Phil. 79–86. But a person who has acquired a foreign domicile does not revive his domicile of origin by accepting an appointment as ambassador from his native country to that in which he has acquired his domicile, *Heath* v. *Samson*, 14 Be. 441. So, also, a Portuguese, who had acquired an English domicile, did not lose it by becoming *chargè d' affaires* in this country for the Portuguese sovereign, *Attorney-General* v. *Kent*, 1 H. & C. 12. Ambassador.

Consuls, also, when sent out from one country to represent it in another, retain the domicile of the country which they serve, Westlake, Intern. Law, 343; see, however, Sto. Conf. Laws, 60. But if a government chooses to employ as consul a person already resident in the foreign country, his domicile is not changed by the appointment. As to consuls, see *Maltass* v. *Maltass*, 1 Rob. 79; *Gout* v. *Zimmermann*, 5 No. Cas. 445; *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; 28 L. J. P. 17; 20 L. T. 41. Consul.

The domicile of a beneficed ecclesiastic is the place where his benefice is situate, Phil. 86. Ecclesiastic.

A prisoner preserves the domicile of his country, Phil. 87; *Burton* v. *Fisher*, 1 Milw. 183. A person transported for life lost his original domicile, Phil. 88–90. Prisoner. Exile.

A fugitive from his country, on account of civil war, retains his domicile in his native land, Phil. 90–97. And, generally, a domicile will not be lost by constrained residence in a foreign country, *In b. Duchesse d' Orleans*, 1 Sw. & Tr. 253; 28 L. J. P. 129. But of course a prisoner, exile, fugitive, or emigrant may, by continuing to reside in a country after his power of choice is restored to him, like the minor who resides in a place after his minority has ceased, acquire Fugitive.

**Domicile.** a domicile therein: see as to the refugee, *Collier* v. *Rivaz*, 2 Cur. 858; and as to the acquisition of a domicile during exile, by forming an attachment to the place of exile, *Heath* v. *Samson*, 14 Be. 441.

3. Domicile of choice—

Of choice.

Domicile of choice is voluntary, the creation of the person. And it may be taken as a general maxim of European and American law that every person *sui juris* is at liberty to choose his domicile, and to change it according to his inclination, Phil. Dom. 98; a peer of the British Parliament may acquire a foreign domicile of choice, *Hamilton* v. *Dallas*, 1 Ch. D. 257; 45 L. J. Ch. 15; 33 L. T. 495. But as in the

Acquired domicile.

*Digest* it is laid down, that, "*Domicilium re et facto transfertur, non nudâ contestatione*," that facts and actions are required to prove a change of domicile (see J. G. Phil., Prin. Jurisp. 162), so it is a principle of English law that the domicile of origin must prevail, until the person has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile, *Somerville* v. *Somerville*, 5 Ves. 786; 5 R. R. 155; *Munro* v. *Munro*, 7 C. & F. 842; *Lord* v. *Colvin*, 4 Drew. 366; *De Bonneval* v. *De Bonneval*, 1 Cur. 857; *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; 29 L. J. P. 1; 1 L. T. 70; and to acquire a domicile there must be actual residence in the place chosen, which must be the principal and permanent residence, *Dalhousie* v. *McDouall*, 7 C. & F. 817. The domicile of origin adheres until a new domicile is acquired, and the onus of proving a change of domicile is on the party who alleges it, *Bell* v. *Kennedy*, L. R. 1 Sc. App. 307; *Attorney-General* v. *Countess Blucher de Wahlstatt*, 3 H. & C. 374; 34 L. J. Ex. 29; 11 L. T. 454. And when a domicile of choice is acquired, the domicile of origin is in abeyance only, but is not extinguished, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

Definition.

An acquired domicile was defined by Kindersley, V.-C., in *Lord* v. *Colvin*, 4 Drew. 376, as follows:—"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home." But when the same case (nom. *Moorhouse* v. *Lord*, 10 H. L. C. 272) came before the House of Lords, the Vice-Chancellor's definition was rejected as being too extensive; it would reach the case of a person of delicate health going to

a milder climate with the determination of remaining there until his health was restored; and it omitted one important element, viz. the fixed intent of abandoning one domicile and permanently acquiring another. The change of residence must be accomplished *animo et facto*: and, briefly, the *factum* required is a change of residence, voluntarily assumed, and permanent in character, *Haldane* v. *Eckford*, L. R. 8 Eq. 631; 21 L. T. 87; and the *animus* required is an intention to settle in a new country as a permanent home, *Douglas* v. *Douglas*, L. R. 12 Eq. 617; 41 L. J. Ch. 74; 25 L. T. 530.

Residence on account of health.

Where a person resides in a foreign country for the benefit of his health, such residence is not necessarily to be considered a compulsory residence, and a foreign domicile may be acquired, *Hoskins* v. *Matthews*, 8 D. M. & G. 13, 28; 25 L. J. Ch. 689. See also *Attorney-General* v. *Fitzgerald*, 3 Drew. 610; *The Lauderdale Peerage*, 10 App. Cas. 692, at page 740. But where a native of the United States resided in England for twenty-seven years, always describing himself as an American citizen, and was not able to return to America on account of the state of his health, which rendered a voyage across the Atlantic impracticable, it was held that he had not abandoned his domicile of origin, *Winans* v. *Attorney-General*, '04, A. C. 287; 73 L. J. K. B. 613; 90 L. T. 721.

Evidence as to domicile.

The question of domicile is one of law and fact, J. G. Phil., Prin. Jurisp. 166; but more of fact than of law, 3 Ves. 201; the proof of intention is the turning-point in questions of this nature, J. G. Phil. 167. All the acts of the deceased are taken into consideration as evidence with respect to his domicile. Oral declarations appear to be but slightly esteemed, *Doucet* v. *Geoghegan*, 9 Ch. D. 441; but to statements in letters great weight was given in the balance of evidence in *Munro* v. *Munro*, 7 C. & F. 842; the locality of a mansion-house kept up by the person whose domicile is in dispute, the place at which his wife and children have resided, the depositaries of his heirlooms, or valuable chattels, or his papers and muniments, his description in legal documents, his possession and exercise of political rights and payment of taxes, the length of time during which he has resided in any one place, have all more or less weight in a case of disputed domicile, Phil. Dom. Ch. 9; Jarm. Wills, Ch. 1; Deane, Wills, 27 *et seq.*; *Lord* v. *Colvin*, 4 Drew. 366; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; 2 Sw. & Tr. 24; *Aitchison* v. *Dixon*, L. R. 10 Eq. 589; 39 L. J. Ch. 705; 23 L. T. 97; *Brunel* v. *Brunel*, L. R. 12 Eq. 298; 25 L. T. 378; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; 43 L. J. Ch. 134; 29 L. T. 666; *Platt* v. *Attorney-General of New South Wales*, 3 App. Cas. 336; 47 L. J. P. C. 26; 38 L. T. 74. In *Re Tootal's Trusts*, 23 Ch. D. 532; 52

**Domicile.**

L. J. Ch. 664; 48 L. T. 816, it was held that the difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile. See also *The Indian Chief*, 3 Rob. Adm. 29; *Maltass* v. *Maltass*, 1 Rob. Ecc. 67; 3 Cur. 231.

Until an acquired domicile is finally abandoned, the domicile of origin does not revive, *Craigie* v. *Lewin*, 3 Cur. 435; *Gout* v. *Zimmermann*, 5 No. Cas. 440; *In b. Bianchi*, 3 Sw. & Tr. 16; 8 L. T. 171; *In b. Raffenel*, 3 Sw. & Tr. 49; 32 L. J. P. 203; 8 L. T. 211. But the domicile of origin revives the moment the acquired domicile is abandoned; the abandonment of the acquired domicile *ipso facto* restores the original domicile, and the original domicile remains until a second domicile of choice has been acquired, *Udny* v. *Udny*, L. R. 1 Sc. App. 441; *King* v. *Foxcell*, 3 Ch. D. 518; 45 L. J. Ch. 693. In order to abandon the domicile of choice and revive the domicile of origin, it is not sufficient for a person to form the intention of leaving the domicile of choice, but he must actually leave it with the intention of leaving it permanently, *Re Marrett*, 36 Ch. D. 400; 57 L. T. 896.

And, generally on this subject, see Dicey, Conflict of Laws.

Will of personalty, *lex domicilii*.

By the *jus gentium*, the law of the testator's domicile at the time of making his will and of his death (if there is no intermediate change) must govern the form of the will of movables and the solemnities of its execution, *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *De Bonneval* v. *De Bonneval*, 1 Cur. 856; *Dolphin* v. *Robins*, 7 H. L. C. 390; *Re Daly's Settlement*, 25 Be. 456. But until Lord Kingsdown's Act, *post* (p. 530), where the law of the domicile at the date of the will differed from the law of the domicile at the testator's death, the latter law prevailed, *Bremer* v. *Freeman*, *ubi sup.*; *Whicker* v. *Hume*, 7 H. L. C. 124. It has been held that a will made in execution of a power was valid, if made and executed in accordance either with the law of the testator's domicile at the date of the will, notwithstanding a subsequent change of domicile, *Tatnall* v. *Hankey*, 2 Moo. P. C. 342; 46 R. R. 63; *In b. Alexander*, 1 Sw. & Tr. 454, n.; Jarm. Wills, 11; see, however, *In b. Hallyburton*, L. R. 1 P. & D. 90; 35 L. J. P. 122; 14 L. T. 136; *In b. Huber*, '96, P. 209; 65 L. J. P. 119; 75 L. T. 453; or with the law of his domicile at the time of his death, *D'Huart* v. *Harkness*, 34 Be. 324; 34 L. J. Ch. 311; *In re Price*, '00, 1 Ch. 442; 69 L. J. Ch. 225; 82 L. T. 79; *Powey* v. *Hordern*, '00, 1 Ch. 492; 69 L. J. Ch.

231; 82 L. T. 51. But in *Re Kirwan's Trusts*, 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292, it was held by Kay, J., that even though a will may have been admitted to probate under Lord Kingsdown's Act, it is not valid as an exercise of a power of appointment by will created by an English instrument, unless such will has been executed in the manner required by sect. 10 of the Wills Act. And where the instrument creating a power contains special directions for its exercise, it is not enough for the valid execution of the power that the instrument purporting to exercise it is a will according to the law of the domicile, but such will must comply with the terms of the power, *Barretto* v. *Young*, '00, 2 Ch. 339; 69 L. J. Ch. 605; 83 L. T. 154.

That the right to probate in England is regulated by the law of the testator's domicile as it existed at the time of his death, and is not affected by subsequent events, see *Lynch* v. *Provisional Government of Paraguay*, L. R. 2 P. & D. 268; 40 L. J. P. 81; 25 L. T. 164.

If a foreigner domiciled abroad makes a will limited to English assets, and appoints persons in England for the limited purpose of collecting the English assets and handing them over to the executor of the domicile, the Court will give effect to such a will by granting administration to the persons so appointed in England for the use and benefit of the executor of the domicile, *In b. Briesemann*, '94, P. 260; 63 L. J. P. 159; 71 L. T. 263. But see *In b. Meatyard*, '03, P. 125; 72 L. J. P. 25; 89 L. T. 70.

As to restrictions on dealing with personalty.

Restrictions on the dealing with personalty, imposed by the will of an Englishman domiciled abroad, executed with the forms required by the law of his domicile, if of a nature recognised by the English law, will be upheld by our Courts, even though such restrictions are not recognised by the *lex domicilii decedentis*, see *Peillon* v. *Brooking*, 25 Be. 218; *Van Grutten* v. *Digby*, 31 Be. 561; 32 L. J. Ch. 179; 7 L. T. 455; *Colliss* v. *Hector*, L. R. 19 Eq. 334; 44 L. J. Ch. 267; 32 L. T. 223. If a testator directs that his will should be construed according to some law other than that of England in which his will is proved, the Court will give effect to that direction, *Bradford* v. *Young*, 29 Ch. D. 617; 53 L. T. 407.

Legacy duty.

The domicile at the time of his death of an owner of personalty determines whether it is or is not liable to legacy duty; when a British subject or foreigner dies domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable to duty; but if he dies domiciled out of England then the whole of his personal property, wherever situate, is to be regarded as situate in the country of domicile, and therefore exempt from

**Domicile.**

legacy duty, *Thomson* v. *Advocate-General*, 12 C. & F. 1; *Re Steer*, 3 H. & N. 594; *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730; *Attorney-General* v. *Napier*, 6 Exch. 217; *Attorney-General* v. *Fitzgerald*, 3 Drew. 610; *Lyall* v. *Paton*, 25 L. J. Ch. 746; *President of U. S. A.* v. *Drummond*, 33 Be. 449; 33 L. J. Ch. 501; 10 L. T. 321. But a rent-charge for lives issuing out of lands in England, although an estate *pur autre vie* applicable by law in the same manner as personal estate, is not personalty, but immovable property, and is not exempt from legacy duty by reason of foreign domicile, *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. Ch. 255; 26 L. T. 267. And leaseholds for years are chargeable with succession duty, not legacy duty. From the Scotch case of *Advocate-General* v. *Grant* (cited in 12 C. & F. 16), it would seem that legacy duty is payable on legacies out of real estate in England, even though the testator died domiciled abroad.

Probate duty.

Probate duty, which is governed by rules different from those affecting legacy duty, is not payable in respect of personalty in a foreign country belonging to a testator dying domiciled in this country, although the property is brought into this country by the executor to be administered, *Attorney-General* v. *Dimond*, 1 Cr. & J. 356; but it is payable on personalty in this country belonging to a testator domiciled abroad. See *Fernandes' Executors' Case*, L. R. 5 Ch. 314; 22 L. T. 219, reversing 39 L. J. Ch. 497.

Estate duty.

By the Finance Act, 1894 (57 & 58 Vict. c. 30), estate duty is now payable in respect of all property situated in the United Kingdom on the death of a deceased person, whatever may be his domicile at the time of his death. No duty is payable in respect of immovable property situated out of the United Kingdom. As to movable property situated out of the United Kingdom, passing on the death of the deceased, estate duty is payable if, under the law in force before the passing of the Act (31st July, 1894), legacy duty or succession duty is payable in respect thereof, or would be payable but for the relationship of the person to whom it passes.

Names of further cases on domicile.

See further as to domicile, *Frere* v. *Frere*, 5 No. Cas. 593, upon the will of a British subject domiciled in and dying at Malta; *In b. Howard*, *ib.* 616, upon the will of a British subject domiciled in England and dying in Norway; *Maltass* v. *Maltass*, 3 Cur. 231; 1 Rob. 67, as to the will of an Englishman dying in Turkey; *Collier* v. *Rivaz*, 2 Curr. 855, on the will of a British subject dying domiciled in Belgium; *In b. Osborne*, 4 W. R. 164, on the will of an Englishman domiciled in Spain; *Reynolds* v. *Kortright*, 18 Be. 417; 104

R. R. 493, a case upon a will written in Spanish of an Englishman dying whilst on a pleasure trip in Cuba; *M'Cormick* v. *Garnett*, 5 D. M. & G. 278; 23 L. J. Ch. 777; *Duncan* v. *Cannan*, 7 D. M. & G. 78; 24 L. J. Ch. 460, both cases on the Scotch law of husband and wife; *Aikman* v. *Aikman*, 3 Macq. 854; and *Re Wright's Trusts*, 2 K. & J. 595, a case in which it was held that a child born before marriage of a domiciled Englishman by a French woman was not, by the subsequent marriage in France of the putative father and the mother, made legitimate so as to share in a bequest to children contained in the will of a person domiciled in England. See also *Allardice* v. *Onslow*, 33 L. J. Ch. 434; 9 L. T. 674; *Jopp* v. *Wood*, 4 D. J. & S. 616; 34 L. J. Ch. 212; 12 L. T. 41.

Two domiciles.

That a man cannot, for purposes of succession, have two domiciles, see *Forbes* v. *Forbes*, Kay, 341. As to a trading company, see *Carron Co.* v. *Maclaren*, 5 H. L. C. 416; and as to a foreigner obtaining in this country a domicile for the purposes of commerce, see *Re Capdevielle*, 2 H. & C. 985; 33 L. J. Ex. 306.

Distribution by the *lex domicilii*.

Administration by *lex loci*.

The doctrine that, in regard to personalty, the *lex domicilii* prevails, respects only the devolution and distribution of the property, and not the administration thereof: for the Court of Administration is, by our law, regulated by the *lex loci rei sitæ*; and the estate must be administered in the country in which possession is taken of it under lawful authority, *Preston* v. *Lord Melville*, 8 C. & F. 1. See also *Lopez* v. *Burslem*, 4 Moo. P. C. 300; *Campbell* v. *Beaufoy*, Joh. 326; *Enohin* v. *Wylie*, 10 H. L. C. 1; 31 L. J. Ch. 402; 6 L. T. 263; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; 35 L. J. P. 129; 15 L. T. 44; *Eames* v. *Hacon*, 18 Ch. D. 347; 50 L. J. Ch. 740; 45 L. T. 196; *Ewing* v. *Orr-Ewing*, 9 App. Cas. 34; 53 L. J. Ch. 435; 50 L. T. 401; and 10 App. Cas. 453; 53 L. T. 826; *In re Truffort*, 36 Ch. D. 600; 57 L. J. Ch. 135; 57 L. T. 674.

Validity of marriage as affected by domicile.

The law of domicile, in addition to its influence on the devolution of property by its bearing on the validity of wills, affects such devolution by its bearing on the validity of marriages. The validity of a marriage in England must be decided according to the law of England, though the domicile of one of the contractors is foreign, *Sottomayer* v. *De Barros*, 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281. But the law of the country in which a marriage is solemnised does not render valid a marriage prohibited by the law of the country in which both the contracting parties are domiciled, *Brook* v. *Brook*, 9 H. L. C. 193; 4 L. T. 93; the forms of entering into the contract of marriage are regulated by the

**Domicile.**

*lex loci*, but the essentials of the contract depend upon the *lex domicilii*. See also *Mette* v. *Mette*, 1 Sw. & Tr. 416; 28 L. J. P. 117; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67; 29 L. J. P. 97; *Argent* v. *Argent*, 4 Sw. & Tr. 52; 34 L. J. P. 133; 12 L. T. 768; *Chapman* v. *Bradley*, 33 Be. 61; and the important case of *Fenton* v. *Livingstone*, 3 Macq. 497, where it is decided that a child born of a marriage voidable but not void in the country of the contractor's domicile, and which child enjoys in that country the status of legitimacy, cannot take by inheritance real estate situate in a country where such marriage is void and incestuous. Although the general rule is that the validity of a marriage and the legitimacy of a child are to be determined by the *lex domicilii*, it was held in *Birtwhistle* v. *Vardill*, 7 C. & F. 895, that a child born in Scotland before marriage of parents domiciled there, though by Scotch law legitimate by reason of the subsequent marriage of the parents, was not capable of taking land in England as heir to his father; and see *Re Don's Estate*, 4 Drew. 194. But in *In re Grey's Trusts*, '92, 3 Ch. 88; 61 L. J. Ch. 622, it was held by Stirling, J., that this rule applies only in case of an intestacy, and does not affect the case of a devise of real estate to "children." A bequest of personalty in an English will to children means to legitimate children. If the bequest is to the children of a foreigner, this means to the legitimate children of the foreigner. To determine who are his legitimate children the domicile of the father must be looked at. Thus a son born in Guernsey before wedlock, but legitimated according to the law of Guernsey by the subsequent marriage of his parents, will take under a bequest in an English will to the children of those parents, *In re Andros*, 24 Ch. D. 637; 52 L. J. Ch. 793; 49 L. T. 163. And a child born before wedlock of parents domiciled in Holland, and legitimated in Holland by the subsequent marriage of the parents, is entitled to share in the personalty of an intestate domiciled in England as one of the next of kin according to the Statute of Distributions, *Re Goodman's Trusts*, 17 Ch. D. 266; 50 L. J. Ch. 425; 44 L. T. 527, in which case the decision in *Boyes* v. *Bedale*, 1 H. & M. 798, was observed upon. According to English law, where at the time of the birth of an illegitimate child the father has his domicile in England, no subsequent change of domicile can render legitimation practicable, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

24 & 25 Vict. c. 114.

In the session of 1861 two Acts were passed to amend the law with respect to wills of personalty as affected by the domicile of the testators. By the first of these Acts, 24 & 25 Vict. c. 114, called Lord Kingsdown's Act, it is enacted (sect. 1)

**Domicile.**

that every will made out of the United Kingdom by a British subject, whatever may be his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed for the purpose of being admitted to probate, if the same is made according to the forms required either by the law of the place where the same was made or by the law of the place where the testator was domiciled when the same was made, or by the law then in force in that part of His Majesty's dominions where the testator had his domicile of origin. See *In re Grassi*, '05, 1 Ch. 584; 74 L. J. Ch. 341; 92 L. T. 455. Such a will is valid, if valid according to the law of the country or place where it is made, although no specific form or forms are prescribed for the making of wills by the law of such country or place, *Stokes* v. *Stokes*, 67 L. J. P. 55; 78 L. T. 50. Every will made within the United Kingdom (sect. 2) by a British subject, whatever his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed and admitted to probate or confirmation, if the same is executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. No will shall be held to be revoked (sect. 3) or to have become invalid, nor the construction thereof be altered, by reason of any subsequent change of domicile of the testator. Nothing in the Act contained shall (sect. 4) invalidate any will, as regards personalty, which would have been valid if the Act had not passed, except as such will may be revoked or altered by any subsequent will made valid by the Act. The Act extends (sect. 5) only to wills made by persons dying after the 6th August, 1861.

When a British subject dies abroad after the passing of this Act, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to file affidavits showing that he had not acquired a foreign domicile, *In b. Rippon*, 3 Sw. & Tr. 177; 32 L. J. P. 141; 9 L. T. 117.

In determining what papers are testamentary under this Act, the Court has regard to the law of one country only, and will not mix up the legal precepts of different countries, *Pechell* v. *Hilderley*, L. R. 1 P. & D. 673; 38 L. J. P. 66; 20 L. T. 1014.

The Act applies to the wills of naturalised British subjects, *In b. Gally*, 1 P. D. 438; 45 L. J. P. 107; *In b. Lacroix*, 2 P. D. 94; 46 L. J. P. 40; but not to the wills of foreigners executed abroad, *In b. Buseck*, 6 P. D. 211; 51 L. J. P. 9; *Bloxam* v. *Favre*, 9 P. D. 130; 53 L. J. P. 26; 50 L. T. 766. It has been held that sect. 3 of the Act is not limited in its

**Domicile.**

operation to the wills of British subjects, *In b. Groos*, '04, P. 269; 73 L. J. P. 83; 91 L. T. 322.

Operation of the Act 24 & 25 Vict. c. 114.

The operation of this Act may be illustrated by the following examples:—

1. A testator, a British subject, and who, at the date of his will, is domiciled in England, makes his will in France; so far as regards personalty, that will is valid if made according to the forms required by the law either of England or of France.

2. A testator, a British subject, and who, at the date of his will, is domiciled in France, makes his will in England; so far as regards personalty (and so far as probate in England is concerned), that will is valid if made according to the forms required by the law of England (by sect. 2) or of France (by sect. 4).

3. A testator, a British subject, whose original domicile was English, and who, at the date of the will, is domiciled in France, makes his will in Prussia; so far as regards personalty (and so far as probate in England is concerned), that will is valid if made according to the forms required by the law of England, or of France, or of Prussia.

4. And in none of the above instances will the will be invalidated by a change of domicile subsequent to the date of the will.

5. This Act leaves untouched the law of devolution of personalty in cases of intestacy as depending upon the law of domicile.

6. Neither does the Act provide for every case of testacy. Suppose, *e.g.*, a British subject resident (but not domiciled) in Portugal, whose original domicile was English, and whose acquired domicile is French, makes his will in Spain, according to the forms required by the law of Portugal (but not according to the forms required by the law either of England, France, or Spain). The will would be invalid. *Qu.* Would it be rendered valid by the subsequent acquisition of a Portuguese domicile?

Many of the cases on domicile have arisen in regard to the wills of Scotchmen domiciled, or supposed to be domiciled, in England; and of Englishmen domiciled, or supposed to be domiciled, in Scotland. The 2nd section of the Act operates beneficially in admitting such wills to probate (in England or Ireland) or confirmation (in Scotland) if executed with the forms required by the law of that part of the United Kingdom where the execution takes place, quite irrespective of whether the testator's domicile be English or Scotch. A domiciled Scotchman made a will, afterwards married in Scotland, and subsequently acquired an English domicile which he retained until his death; it was held, under sect. 3, that as the will

was valid so long as he remained in Scotland, it was not revoked by the subsequent change of domicile, *In b. Reid*, L. R. 1 P. & D. 74; 35 L. J. P. 43; 13 L. T. 681. See also *In b. Groos*, '04, P. 269; 73 L. J. P. 82; 91 L. T. 322.

24 & 25 Vict. c. 121.

The Act 24 & 25 Vict. c. 121 enacts (sect. 1) that whenever His Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments therein contained shall be applicable to the subjects of His Majesty and of such foreign state respectively, it shall be lawful for His Majesty, by Order in Council, to direct that after the publication of such Order no British subject, resident at the time of his death in the foreign country named in such Order, shall be deemed under any circumstances to have acquired a domicile in such country, unless such British subject shall have been resident in such country for one year immediately preceding his decease, and shall also have made and deposited in a public office (to be named in the Order in Council) a declaration in writing of his intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration, shall be deemed for all purposes of testate or intestate succession as to movables to retain the domicile he possessed at the time of going to reside in such foreign country. The Act shall not apply (sect. 3) to foreigners who may have obtained letters of naturalisation in any part of His Majesty's dominions. The 2nd and 4th sections provide for the case of subjects of foreign states dying in His Majesty's dominions.

The object of both these Acts (it may be presumed) was to prevent the frequent and expensive litigation which arose from the existence of uncertainty as to the domicile of testators, and, in consequence, as to the validity of their testamentary dispositions. The first-mentioned Act seeks to accomplish this object by relieving British subjects (for testamentary purposes, and so far as British legislation is competent to do so) from the consequences of a foreign domicile, and by relaxing the stringency of the rule which necessarily required a compliance with the formalities of execution prescribed by the laws of the place of domicile; the efficacy of such a compliance is not destroyed, but the observance of other formalities is rendered equally valid, whatever the actual domicile may be; and thus, in most cases, if not in all, litigation to determine the domicile is rendered unnecessary. The secondly-mentioned Act seeks to attain the same end in a different manner, by a strict definition of the Acts which, and which alone, will constitute for testamentary purposes an abandonment of the domicile possessed by the testator at

**Domicile.**

the time of going to reside in the foreign country in which his death takes place.

Operation of 24 & 25 Vict. c. 121.

It is only with the concurrence of each foreign state that this Act can be made applicable to British subjects and the subjects of that foreign state; but, as far as the editor is aware, no convention with any foreign power has been agreed to by His Majesty, and consequently the Act is inoperative.

When it comes into operation by means of a convention with any particular state, this Act will extend to cases of intestacy, as well as of testacy, of British subjects, occurring within that state.

However, considering that this Act has been allowed to remain a dead letter for over forty years, the prospect of its ever coming into operation seems small. As to the questions which might arise if both the above Acts were operative, see the remarks of Lord St. Leonards, R. P. Stat. 397–409.

# III.

## ON A TESTAMENTARY CHARGE OF DEBTS (*a*).

Charge of debts on real estate.

It is very common to find wills commencing with a clause like the following:—"I direct that my debts, funeral and testamentary expenses be paid," without expressly conferring on any specified persons a trust or power for the purpose of working out the charge of the debts on the real estate which those words have been held to create.

Any form of words amounting to an expression of intention that the testator's debts shall be paid—no direction being given to the executors to do so—will amount to a charge of debts on the real estate. The following have been held to have that effect, namely, "I direct my debts to be paid," "my debts being first paid," "after paying my debts"; and other similar expressions, which will be found collected, Jarm. Wills, 1390 *et seq.*

But if the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose, or if the debts are directed to be paid by the executors, the real estate, unless it also is devised to the executors, is not charged with the debts, *ib.* 1397, 1400.

The consequence of wills containing some such general words as are above referred to, but not expressly providing the requisite machinery for working out the charge, has been a vast amount of litigation of the most unsatisfactory kind, resulting in irreconcilable decisions, tending to throw doubt upon innumerable titles.

Questions which may arise.

Various perplexing questions arise, of which it may be sufficient to allude to the following:—

1. What is the distinction, and what are the consequences of the distinction, between a mere general charge of debts, and such a charge as is created by a devise to trustees upon trust to sell—in fact a trust for sale?

---

(*a*) It would seem that many of the questions discussed in this essay will no longer arise in the case of a testator dying after the 31st December, 1897, so far as freehold property is concerned, inasmuch as the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), enacts that such freehold property is to devolve upon the personal representatives in the same manner as a chattel real.

**Charge of Debts.**

2. What is the distinction, and what are the consequences of the distinction, between a devise expressly upon trust to pay debts, and a beneficial devise subject to a charge of debts?

3. Who is the proper person to sell or mortgage real estate charged with debts for the payment of those debts? Is the executor authorised to sell?

4. Who is the proper person to receive the purchase-money? The devisee, or the executor? Or the devisee and the executor jointly?

5. How is the purchaser affected by notice of the state of affairs at the time of the sale? Has he a right, or is he concerned, to know that debts of the testator remain unpaid? Is he bound to see to the application of the purchase-money?

6. When a charge of debts has once been fastened on the land, can the title be made clear and free from objection, without an actual sale by the person on whom is imposed the duty of working out the charge?

Trust for payment of debts.

*Stroughill* v. *Anstey*.

It was laid down by Lord St. Leonards, in *Stroughill* v. *Anstey*, 1 D. M. & G. 635; 22 L. J. Ch. 130; 91 R. R. 210, that if a trust be created for the payment of debts and legacies, it is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and the purchaser or mortgagee is in no case bound to see to the application of the money raised. The testator invests his trustees with power to receive the money in the anticipation that there will be debts to be paid, but the intention does not cease to operate because there are no debts. People, however, "who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about." See 1 D. M. & G. 653, 654. But there is no presumption that the debts have been paid unless twenty years have elapsed from the testator's decease, *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 542.

Devise subject to charge of debts; or a mere charge of debts.

But suppose there is not an express trust created for payment of debts, but a devise subject to a mere charge of debts, can the executor sell? Does the charge raise an implied legal power, *i.e.* a power under which the executor can pass the legal fee, in defeasance of the title of the devisee? Prior to the decision in *Shaw* v. *Borrer*, 1 Ke. 559; 44 R. R. 115, it was the recognised doctrine that, where land is charged generally with the payment of debts, the ownership goes on for all purposes of transfer—subject to the equitable charge till satisfied, but otherwise—as freely as if that charge had

**Charge of Debts.**

not been created, and whenever the owner for the time being makes a *bonâ fide* sale or mortgage, and receives the money, the purchaser or mortgagee is absolved from all liability in respect of the application of the money.

General charge of debts does not give executor a legal power to sell.

The question at law is free from doubt. A general charge of debts does not give the executor by implication a legal power to sell real estate, and he cannot convey the legal estate, *Doe* v. *Hughes*, 6 Exch. 223; 86 R. R. 252; see also *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; 6 R. R. 746; *Doe* v. *Claridge*, 6 C. B. 641. The legal estate passes to the devisee, or descends to the heir, subject to an equitable charge, *i.e.* a charge to be enforced by the Court in the usual course of administration.

The cases in equity.

*Shaw* v. *Borrer*, &c.

*Robinson* v. *Lowater.*

The case in equity with which the difficulty began is *Shaw* v. *Borrer*, 1 Ke. 559; 44 R. R. 115, decided in 1836. This was followed by *Ball* v. *Harris*, 4 M. & C. 264, in 1838; *Forbes* v. *Peacock*, 12 Sim. 528; 1 Ph. 717; 63 R. R. 694, in 1843; *Gosling* v. *Carter*, 1 Col. 644; 14 L. J. Ch. 218, in 1845; *Robinson* v. *Lowater*, 17 Be. 592; 5 D. M. & G. 272; 23 L. J. Ch. 641; 104 R. R. 115, in 1854; *Wrigley* v. *Sykes*, 21 Be. 337; 30 L. J. Ch. 359; 4 L. T. 226, in 1856; *Eidsforth* v. *Armstead*, 2 K. & J. 333; 25 L. J. Ch. 237, in 1856; *Sabin* v. *Heape*, 27 Be. 553; 29 L. J. Ch. 79; 1 L. T. 51, in 1859; and *Greetham* v. *Colton*, 34 Be. 615; 13 L. T. 34, in 1865. Lord Lyndhurst's decision, however, in *Forbes* v. *Peacock*, amounted to no more than this, that where there was a power to sell for payment of debts and legacies, there was an implied power to give a receipt for the purchase-money; see *Carlyon* v. *Truscott*, L. R. 20 Eq. 348; 44 L. J. Ch. 186; 32 L. T. 50. Through this series of cases (involving, of course, a great variety of details), the power of sale, once created, has been gradually shifted from the devisee to the executor in concurrence with the devisee, and finally to the executor alone. The doctrine of *Eidsforth* v. *Armstead* is, indeed, somewhat different, viz. that the charge of debts raises an implied power of sale in some one, and that the donee of the power is to be ascertained from the whole will. But the executorial authority culminated in *Sabin* v. *Heape*, where it was held that, under the implied power of sale raised by a general charge of debts, the executors of an executor could sell over the heads of devisees who had been twenty-eight years in possession, that the purchaser was not bound to see to the application of the purchase-money, and was not entitled to know whether any of the testator's debts remained unpaid. On the last point, however, this case was disapproved in *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; 51 L. J. Ch. 434; 56 L. T. 542,

*Eidsforth* v. *Armstead.*

*Sabin* v. *Heape.*

**Charge of Debts.**

and the period within which a purchaser is not bound or entitled to inquire whether debts remain unpaid was fixed at twenty years from the testator's death, the period of statutory limitation for a specialty debt.

In *Cook* v. *Dawson*, 29 Be. 123, Lord Romilly stated as follows:—"In the first place, it is clearly established, that where there is a general charge of debts on the real estate, the executor has power to sell the estate for that purpose, and that the purchaser is not bound to look to the application of the purchase-money. . . . The authorities further determine, that where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by the will. But an exception obtains where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, in which case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor. . . . But this exception is again liable to another exception, namely, where the will contains a devise of land to the executors, there the direction that the debts are to be paid by the executors does not affect the validity of the general charge of debts." But it is a question of intention, to be collected from the whole will, whether the estate so devised to the executors is charged with the debts or not, *In re Bailey*, 12 Ch. D. 268; 48 L. J. Ch. 628; 41 L. T. 157; the rule, however, applies whether the executors take the whole beneficial interest in the realty charged, *Henvell* v. *Whitaker*, 3 Rus. 343; or only a life interest, *Finch* v. *Hattersley*, *ib.* 345 n.; 27 R. R. 88; or no beneficial interest at all, *Hartland* v. *Murrell*, 27 Be. 204. And where the devise to the executors was (without the charge of debts) insufficient to carry the fee simple, it has been held that the charge of debts enlarged their estate into a fee simple, *Creaton* v. *Creaton*, 3 S. & G. 386; 26 L. J. Ch. 266; 107 R. R. 120; *Marshall* v. *Gingell*, 21 Ch. D. 790; 51 L. J. Ch. 818; 47 L. T. 859; *In re Brooke*, '94, 1 Ch. 43; 63 L. J. Ch. 159; 70 L. T. 71.

If executor is to raise money by sale of realty, it must be by virtue of an intention of testator to that effect.

The decision in favour of the executor being the person to raise the money for payment of debts rests upon the argument that he is the person who would have to apply the money when raised. But is it not clearly settled that the duties of an executor, *quâ* executor, are confined to his testator's personalty? If an executor in that capacity has any power over realty, it can only be from the expression by the testator of an intention to that effect, or the clear implication of such an intention from the terms of the will. And it

**Charge of Debts.**

may be remarked that it was on the ground of such an intention manifested by the will that Lord Justice Turner affirmed the decision in *Robinson* v. *Lowater*.

In *Colyer* v. *Finch*, 5 H. L. C. 905; 26 L. J. Ch. 65; 101 R. R. 442, Lord Cranworth, C., said: "Where there is a general charge of debts, and no legal estate given anywhere, it may be that, as against the heir-at-law, an executor may, by implication, sometimes, perhaps always, have impliedly a power to convey the legal estate in order to raise the money; but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies. There, that money is to be raised through the instrumentality of a sale by the devisee, and that devisee there is the person, and the only person, that can make a legal title."

Right to receive money from sale, different from right to sell.

Again, assuming that the executor is the proper person to apply the money when raised, it does not follow that he is the proper person to raise it. A right to receive the money to arise from the sale of an estate is not the same thing as a right to sell the estate: if it were, every person who has an equitable charge on an estate would have the right to sell it.

Direction that debts be paid by executor does not give implied power to sell realty.

Also, if a direction to pay debts gives an executor power to sell lands, it ought to follow that a testator's direction, that his debts should be paid by his executor, gives the executor a like power. But this is not the case (*supra*, p. 538), unless the executor is also devisee; and then he sells, not as executor, but as a devisee. The doctrine of *Robinson* v. *Lowater*, taken in conjunction with the recognised doctrine of the Courts, leads then to this anomaly, that where a testator simply directs his "debts to be paid" (without saying by whom), the executor takes an absolute power of sale of all the real estate: but where a testator directs his debts "to be paid by his executor," the executor has no power whatever over the real estate.

*Robinson* v. *Lowater*.

In all the cases prior to *Robinson* v. *Lowater*, in which the executor was held to take an implied power of sale, there were either express directions for sale, or words from which nothing else could reasonably be implied. The only doubt was as to the person who should carry out the direction. In *Robinson* v. *Lowater*, however, there was no direction to sell, express or implied: a mere charge of debts, and nothing more. Why should a charge of debts imply a power of sale in any one? An ordinary charge upon an estate does not confer a power of sale.

Power collateral can now be released.

Until recently, this implied power of sale, being a power "simply collateral," was incapable of being released. When

**Charge of Debts.**

once created, therefore, it became a perpetual incumbrance on the title, unless a sale, whether necessary or unnecessary, was actually made under the power. To avoid this serious inconvenience, it seems probable that it would have been held, that, on a sale of the charged lands by the devisee, the executor, by authorising the payment of the purchase-money to the vendor, bound all parties claiming in respect of a right to have moneys raised out of the lands, which, if so raised, would have to pass through the executor's hands. See *Storry* v. *Walsh*, 18 Be. 559; 27 L. J. Ch. 338. And now, by sect. 52 of the Conveyancing Act, 1881, the executor may release the power.

Opinions of writers and eminent conveyancers.

The doctrine in question has met with the modified approval of Mr. Clayton, in his "Elements of Conveyancing"; but the preponderance of opinion of text-writers and conveyancers is opposed to the decisions above referred to: see the tract of Mr. Joshua Williams, "On the power of an executor to sell real estate under a charge of debts," containing the opinions of Mr. Hayes and Mr. Christie; J. Williams, Real Assets, Ch. 6; Dart, V. & P. 697 *et seq.*; and Sugd. V. & P. 662 n., where Lord St. Leonards speaks of the decisions in *Robinson* v. *Lowater* and *Wrigley* v. *Sykes* as having introduced considerable difficulty upon titles. See also *Cook* v. *Dawson*, 3 D. F. & J. 127; *Hodkinson* v. *Quinn*, 1 J. & H. 303; *Howard* v. *Chaffers*, 2 Dr. & S. 236, 245, 249.

The result of the cases has been thus stated: "Where there is a general charge of debts upon real estate, the executors have in equity an implied power to sell it, and they alone can give a valid receipt for the purchase-money; but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, the persons in whom it is vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance." See the notes to *Elliot* v. *Merryman*, 2 Atk. 43, in 1 Wh. and Tud. L. C. Eq. In other words, that the executors take an equitable power of sale, and the holder of the legal estate is a trustee for them. See also Farwell, Pow. 75 *et seq.*; Lewin, Trusts, Ch. 18, sect. 2, p. 527.

The true principle suggested.

It is submitted that the true principle is that a mere general charge of debts creates neither a trust for sale nor a power of sale. The creditors of the testator have undoubtedly, under a charge of debts, the same right to the realty as if there were a trust or power of sale; but their proper remedy is by application to the Court for the administration of the estate. If, however, the doctrine of *Shaw* v. *Borrer* and *Ball* v. *Harris* —that a power of sale is created by a charge of debts—is considered too firmly established to be now overruled, it is

submitted that the proper person to exercise the power is the devisee (or heir) in whom the legal estate is vested, and not the executor. That whenever lands, subject to a charge of debts, are *bonâ fide* sold or mortgaged by the owner for the time being claiming through the testator, and such owner receives the money, the land so sold or mortgaged is from that time exonerated from the charge, and the purchaser or mortgagee is exonerated from all liability to see to the application of the money: the exoneration of the purchaser or mortgagee being founded, first, on the impossibility of his ascertaining the state of the testator's affairs, and, secondly, on the fact that the money in the hands of the vendor or mortgagor is primarily applicable to the payment of debts, if any then exist. **Charge of Debts.**

Where a testator directed all his debts to be paid, and afterwards devised real estate, specially charged with debts and legacies, to J., who was one of his executors, it was held that the devise superseded the power of sale in the executors, and that J. could give a title to the estate without the concurrence of the other executor, *Corser* v. *Cartwright*, L. R. 7 H. L. 731; 45 L. J. Ch. 605. And it is submitted that the rule is, or ought to be, that a beneficial devise subject to a general charge of debts and legacies is indefeasible by any implied power lodged in the hands of others than the devisee, and that such a devise carries with it, through all subsequent modifications of the ownership, a capacity to confer a clear title on a purchaser or mortgagee, as against dormant creditors and legatees of the original testator.

Sects. 14—18 of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, relate to the subject of this note, and are intended to remove the difficulties which have occurred in some of the previously-cited cases. Sect. 14 enacts, that where a testator (dying after the 13th August, 1859) charges his debts or legacies upon his real estate, but creates no trust or other machinery for working out the charge, and, subject to such charge, devises the estate to trustees for the whole of his interest therein, it shall be lawful for the devisees in trust (not the executors) to raise the money by sale or mortgage, notwithstanding any express trusts declared by the testator. But if the testator has not devised the estates, charged as aforesaid, in such terms as that his whole estate and interest therein becomes vested in trustees, then (by sect. 16) the executors are empowered to sell or mortgage for the payment of debts. But (by sect. 18) these provisions do not apply to a beneficial devise of real estate in fee, or in tail, or for the testator's whole interest therein; nor do they affect the power of the beneficial devisee to sell or mortgage as he might have

22 & 23 Vict. c. 35, ss. 14—18.

**Charge of Debts.**

done before the Act. All sales or mortgages made prior to the 13th August, 1859, are saved from the operation of the Act; and (as before stated) the Act applies only to the case of a testator who has died since that day. See Sugd. V. & P. 502.

Where both the persons named as executors renounced probate, an administrator with the will annexed could not sell under sect. 16, *Re Clay and Tetley*, 16 Ch. D. 3; 43 L. T. 402. The question, what estate the trustees take under a devise to them, appears to be left untouched by these sections, see Hawkins, Constr. Wills, 151, n.

Cases in which the difficulty is removed.

The difficulty has thus been removed in two cases: first, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts; and secondly, by giving the executor power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee.

Cases in which the difficulty remains.

But in the cases where the testator died before the 13th August, 1859, or where there is a devise subject to the charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before.

No testator then ought to create a charge of debts upon his real estate, without at the same time expressly creating a trust or power for giving effect to the charge, and without distinctly pointing out the persons by whom the trust or power is to be exercised. It is on this principle that the forms of wills contained in this volume have been framed. It will be noticed that words amounting merely to a charge of debts, without the proper machinery for fully working out the charge, have been omitted.

## IV.

## DEPOSITORY FOR WILLS OF LIVING PERSONS (*a*).

*Instructions to Depositors.*

In pursuance of the provisions of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 91, the Principal Registry of the Court of Probate, 6, Great Knight Rider Street, Doctors' Commons, London, was provided as a depository for the wills of living persons. During the year 1874, the wills accumulated at Doctors' Commons—the original wills commencing with the year 1483, and copies dating from a century earlier—were removed to Somerset House, at which place searches for wills have now to be made. The Principal Probate Registry of the High Court of Justice, Somerset House, Strand, London, is the depository now provided for the wills of living persons; and testators are at liberty to deposit their wills or codicils therein, under the following regulations:—

The will or codicil to be deposited must be enclosed in a sealed envelope and delivered to one of the Registrars of the Principal Probate Registry, either by the testator himself, or by some person specially authorised by him to deposit the same on his behalf.

The will or codicil so deposited will not be delivered up to any person, but must remain in the Registry until after the testator's death, unless revoked by him in manner hereinafter mentioned.

In case the testator himself deposits his will or codicil, he will be required to sign his name, or acknowledge his signature, in the presence of the Registrar, to an indorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, *or* codicil to the last will and testament, *or* last will and testament and codicil thereto, bearing date respectively [*here*

(*a*) See the remarks in *Johnson* v. *Lyford*, L. R. 1 P. & D. 546; 37 L. J. P. 65, and in *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, at p. 204, as to the desirability of a depository for wills.

**Depository for Wills.**

*state the dates of all the papers enclosed*], of A. B. of &c., whereof C. D. of &c., and E. F. of &c., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justices by me for safe custody, there to remain deposited until after my decease, unless previously revoked by destruction in my presence and by my direction."

*The residences of the testator and of the executors should be set forth in this indorsement, and also the date of signature.*

In case the testator authorises some other person to deposit his will or codicil for him, he will be required to subscribe his name, in the presence of an attesting witness, to an indorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, *or* codicil to the last will and testament, *or* last will and testament and codicil thereto, of me, A. B. of &c., whereof C. D. of &c., and E. F. of &c., are appointed executors, and I authorise G. H. to deposit the same for safe custody in the Principal Probate Registry of the High Court of Justice, there to remain deposited until after my decease unless previously revoked by destruction in my presence and by my direction.

(Signed) A. B.
Witness, K. L."

*The residences of the testator and of the executors, and the date of signature, should be set forth in this indorsement.*

The packet containing the will or codicil must be accompanied by an affidavit from the attesting witness, to the effect that the signature of the testator to the above indorsement, witnessed by the deponent, is in the proper handwriting of such testator, and was by him signed in the deponent's presence on the day mentioned in the indorsement, and that the signature K. L. is in the proper handwriting of the deponent. An affidavit will also be required from the person authorised to deposit the packet to the effect that the sealed packet produced for the purpose of being deposited for safe custody in the Principal Probate Registry of the High Court of Justice, and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight, and condition as when received by the deponent from the hands of A. B. [the testator], on a day to be mentioned as that on which he received it.

The last-mentioned affidavit is to be sworn before the Registrar to whom the packet containing the will or codicil is delivered.

**Depository for Wills.**

A Minute will be drawn up in duplicate by the Registrar setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and the declaration of the testator or his agent that he deposited the same in the Registry for safe custody, also acknowledging the receipt of the packet. One copy of this Minute will be delivered to the testator or his agent and the other retained in the Registry.

The following fees will be payable in stamps:—

| | *s.* | *d.* |
|---|---|---|
| For depositing the will and receipt for same | 10 | 0 |
| For drawing and entering Minute of the Registrar | 2 | 6 |
| For filing each affidavit | 2 | 0 |

Envelopes for wills and codicils, with the necessary indorsments and forms of affidavits, are to be had on application to the Record Keepers at the Principal Probate Registry.

Testators are at liberty to transmit their wills and codicils to the Principal Probate Registry, to be deposited there for safe custody, through the Registrar of a District Probate Registry, who will send the same by the general post in a registered letter.

The affidavit of the person authorised by the testator to deposit his will or codicil will in that case be sworn before the District Registrar to whom the packet containing them is delivered.

On production to the District Registrar of the sealed packet containing the will or codicils to be deposited and the affidavits (if any), he will draw up a certificate under his hand, setting forth when and by whom the same were produced to and left with him, and file this certificate in his District Registry, and he will transmit an office copy of the certificate, with the sealed packet and affidavits and form of receipt, to the Principal Probate Registry. The receipt will be returned to him under the hand of one of the Registrars of the Principal Probate Registry.

The following fees will be payable to the District Registrar in addition to the fees before mentioned:—

| | *s.* | *d.* |
|---|---|---|
| For his certificate | 2 | 6 |
| For filing the same | 2 | 0 |
| For office copy to transmit with the will or codicil | 2 | 6 |
| For receipt | 1 | 0 |

**Depository for Wills.**

In the event of a testator desiring to revoke a will deposited in the Registry, he will be at liberty to do so upon his producing the original minute of the Registrar handed to him on depositing the same, and such other proof of identity as one of the Registrars may deem necessary. The will to be revoked will not be delivered out of the Registry, but will there be destroyed, in the presence and by the direction of the testator.

# INDEX.

[*The Italics refer to the Notes; the rest to the Forms, as to which see also* TABLE OF CONTENTS.]


ABATEMENT,
*legacy duty, of gift of*, 251.
*wife, of legacy directed to be paid soon after death to*, 274.

ACCELERATION,
*devises or bequests in remainder, of*, 37.
*shifting clauses by*, 500.

ACCOUNTANTS,
employment of, in administration of trust property, 356, 489.

ACCOUNTS,
power to settle, 385, 507, 508.

ACCRUER,
between children, 264, 286, 301, 313, 339, 364, 401, 460, 469, 474, 484, 509.
grandchildren, 299, 302, 303, 307, 308, 315.
*clauses of, accruing shares subjected to*, 295.
*framing, suggestions as to*, 292 *et seq.*
"*others*" *and* "*survivors*" *in*, 293.
"*survivor*" *when construed as* "*other*" *in*, 293.
"*longest liver*" *in*, 294.
*survivorship in, period of*, 295.

ACCUMULATION,
trust for, 216, 254, 349, 381.
*debts for payment of*, 388, 390.
*distribution of, period for*, 390.
*Ireland, in*, 391.
*maintenance allowed though prior trust for*, 180, 181, 258.
*of surplus after*, 180.
*portions, for raising*, 388, 390.
*restraints on*, 388 *et seq.*
*Scotland, in*, 388.
*timber, of produce of*, 388.
*time during which, allowed*, 388 *et seq.*
*trusts for, implied*, 389.
*what is not a*, 390.

ACKNOWLEDGMENT,
*signature by testator, of*, 22, 105.
*witness to a will, of*, 27.

ACTS OF PARLIAMENT,
*marginal notes to*, 1.
*punctuation in*, 136.

ADEMPTION,
*advancement by*, 401, 402.
*codicil after*, 402.
*portions, by*, 402, 403.
*specific legacies of*, 62, 116, 117, 464.

ADMINISTRATION,
*governed by lex loci*, 529.

ADMITTANCE,
*compelling*, 159.
*devise without*, 4, 7, 101, 159, 317.
*fines and fees not affected by non-, to use of will*, 5.

ADVANCEMENT,
children, of, 178, 185, 221, 254, 264, 271, 287, 302, 339, 345, 352, 356, 382, 401, 492.
consent of tenant for life to, 221, 254, 271, 345, 492, 504.
nephews and nieces of, 214, 218, 221.
prior trusts, notwithstanding, 365.
contingent shares, out of, 218, 221, 271, 339, 345, 356, 495.
grandchildren and remoter issue, of, 302, 352, 382, 492.
gross sum after obtaining vested interest, of, 495.
mortgaging or charging for purposes of, 264.
to be brought into account, 505.
value of share for purpose of, determination by trustees of, 505.
*ademption of legacies by*, 402.
*clause, absence of*, 493.
*debts, for payment of*, 265.
*evidence of*, 403.
*infants of, power of trustees as to*, 265.
*interest on amount of*, 403.

ADVOWSON,
devise of, in fee, 477.
to trustees to present aged clerk and sell, 478.
son and subject thereto in settlement, 479.
if qualified, 479.
sell with power to postpone sale and present son, 480.
*assets for payment of debts, as*, 477.
*descent of*, 477.
*devise of*, 477.
*incorporeal hereditament, is*, 477.
*life estate in, purchase of*, 478.
*sale of*, 478.

AFTER-ACQUIRED PROPERTY,
*devise or bequest of*, 5, 57, 103.

AGE,
*child-bearing, of*, 245.
*computing, mode of*, 260.
*testators, of*, 8, 30, 91.

AGENTS,
*direction to employ particular*, 131.
*employment of, in administration of trust property*, 359, 489, 508.
*partnership of, sharing in profits*, 346.

AGREEMENT,
*to leave property by will, enforcing*, 510.

ALIEN,
*will of, Naturalization Act*, 1870, *under*, 91.
*not affected by Wills Act*, 3.
*validity of*, 2.

ALIENATION,
cesser upon, proviso for, 213, 220, 298, 301, 307, 315, 362, 400, 466, 472, 490.
*discretionary power of trustees on*, 241.
*forfeiture on*, 240, 388, 455, 456, 466.
*income, cesser of, on*, 240.
*limited power of*, 241.
*restraint on*, 240 *et seq.*
*dispensing with*, 243, 244, 422.
*extent of*, 240.
*future coverture on*, 242.
*married woman, by*, 241.
*perpetuities, how affected by rule against*, 323.

ALLOTMENT,
in specie of real estate, 384.

ALTERATIONS,
will, in, memorandum and attestation of, 513, 514.
*estate of, revocation of wills by*, 41, 54.
*execution of*, 48.
*identification by codicil of*, 51.
*presumption as to time of making*, 48.
*unattested will of soldier or seaman, in*, 31.

ALTERNATIVE GIFT,
*perpetuity rule as to*, 324.

AMANUENSIS,
*signature of testator by*, 21.

ANATOMY ACT,
*post-mortem examination, power to direct under*, 447.

"AND,"
*change of, into "or," and vice versâ*, 317.

ANIMUS TESTANDI,
*necessity for*, 12.

ANNUITY. See RENT-CHARGE.
alienation of, cessor on, 220, 400, 456.
appropriation of fund to answer, 191, 200, 220, 300, 335, 453, 454.
deferred, 503.
forfeiture on alienation of, 220, 400, 456.
joint, 220.
life, bequest of, 191, 200, 216, 219, 299, 335, 339, 345, 352, 400, 453, 454.
payment of, direction as to, 200, 220, 299, 381, 400, 453, 494, 503.
purchase, direction to, 158, 219, 453.
reducible on marriage of wife, 381, 400, 494.
*apportionment of*, 187.
*capital value of, when annuitant or his representatives entitled to*, 167.
*commencement of, time for*, 197.
*deficiency of income of fund producing*, 194.
*corpus when applicable in case of*, 194, 195.
*duration of*, 193.
*legacy, when equal to bequest of a*, 167.
*duty on*, 196.
*life, for, what constitutes an*, 72, 193.
*marshalling for payment of*, 195.
*payment of, direction as to*, 503.
*modes of providing*, 166.
*time for*, 197.
*perpetual, when*, 193.
*registration of*, 196.
*taxes, free from*, 196.

ANTICIPATION. See ALIENATION.
*restriction on*, 242 *et seq.*

APPOINTMENT. See POWERS OF APPOINTMENT.

APPORTIONMENT,
clauses negativing, of rents, etc., current at death, 143, 157, 185, 213, 272, 299, 309, 310, 463.
*annuities, of*, 187.
*assurance policies, of*, 187.
*dividends, of*, 187.
*income, of*, 187.
*profits, of*, 187.
*rates, of*, 187.
*rents, of*, 187.

APPORTIONMENT ACT, 1870,
*sect.* 2 (*periodical payment*), 187.
*sect.* 6 (*assurance policies*), 187.
*sect.* 7 (*provisions excluding*), 187.

APPROPRIATION. See ANNUITY.
*share of legatee of*, 505.

ARBITRATION,
power to refer to, 508.

ARMS,
name and, clause, 414, 498.
*name and, clause enjoining use of*, 420.

ASSETS,
*estate pur autre vie as*, 8.
*freehold and copyhold estates as*, 201, 202.
*order of application of, in payment of debts*, 202.

ASSURANCE,
policies of life, discretion as to sale of, 503.
*policies of life, apportionment of*, 187.

ATTAINDER,
*testamentary capacity, effect on, of*, 99.

ATTESTATION. See SIGNATURE, WITNESSES.
to will executed on day of testator's marriage, 515.
where testator signs, 138, 513, 514.
directs another to sign, 513.
*alterations of*, 51.
*clause, desirability of full*, 28, 106, 136.
*disposition by*, 439.
*position of*, 28, 136.
*special, unnecessary*, 12, 28, 104, 106.
*interlineations, of*, 48.
*witnesses at, competency of*, 35, 36.
*evidence of*, 27, 28.
*legatees as*, 36, 37, 358, 359.
*number of*, 10, 11, 104.
*presence of*, 10, 21, 22, 104.
*subscription of will by*, 10, 104.

AUTRE VIE,
*estates pur, descent of*, 8.
*devise of*, 5, 102.
*quasi tenant in tail, by*, 102.
*liability of, as assets for payment of debts*, 8.
*special occupant of*, 8.

BAILIFF,
employment of, in administration of trust property, 356, 489.

BANK STOCK. See STOCK.

BANKRUPTCY. See ALIENATION.

BASTARD. See ILLEGITIMATE CHILDREN.

BEQUEST,
business of. See BUSINESS.
conditional, 461.

BEQUEST—*continued.*
debtor, to, of debt, 462.
executors. See EXECUTORS.
house to wife for life, remainder to son absolutely, 200.
or till marriage, 355, 363.
household furniture, of. See HOUSEHOLD EFFECTS.
land sold under contract, in place of, 482.
lapsed. See LAPSE.
**on trust for,**
brothers of residue ultimately, 191, 222, 314, 339, 382.
children after wife's life interest, 149, 170, 176, 267, 270, 313, 336, 339, 355.
alienation, till. See ALIENATION.
daughters' share settled, 176, 177, 183, 490.
equally, with benefit of accruer. See ACCRUER.
illegitimate, 216.
issue of deceased child taking parent's share. See SUBSTITUTION.
life, for, remainder to issue as children appoint and in default on trusts by reference, 287.
unequally subject to annuity to wife, 495.
younger, absolutely with executory limitations between them and eldest son, 264.
by name, 453.
classes, 151, 170, 183, 200, 214, 215, 216, 219, 221, 222, 267, 270, 286, 299, 301, 336, 345, 351, 382.
cousin for life, then to his children, 216.
daughters till marriage, then or on death of all amongst all and children of deceased daughters *per stirpes*, 151.
with settlement of their shares, 176, 183, 490.
husband for life, 189, 191, 221.
mother for life, remainder to sister absolutely, 253.
nephews and nieces, 211, 214, 217, 218, 220.
niece for life, remainder to her husband for life, then to children equally, 466.
sisters of residue ultimately, 191, 222, 314, 382.
wife during widowhood charged with maintenance, remainder to children equally, 400, 489.
remainder to children and issue *per stirpes*, 170, 270, 336.
daughters' shares settled, 183, 490.
wife for life, annuity of, balance to children, 351.
charged with maintenance, then to children, *per stirpes*, 345, 349.
then to children equally with benefit of accruer, 313.
as she appoints, and in default to fall into residue, 362.
pay legacy to one son and divide surplus among other children, 267.
son, but in event of his death under age, to wife absolutely, 254.
specific. See LEGACIES.

BEQUEST—*continued.*
to,
brother of leaseholds absolutely, 213.
charged with sum in aid of residue, 213.
for life, remainder to nephew, 213.
classes, 212, 213.
nephews and nieces, 200, 212, 213, 214.
servants. See SERVANTS.
sisters, 190, 253.
sons absolutely, 200.
after wife's life interest, 149, 199.
business books of, 464.
share in, 464.
first entitled to possession of settled freehold estate, 469.
younger, 157.
wife for intermediate use, 170, 182, 263, 270, 311, 351, 361, 449
life, then to sons equally, 149, 199.
till marriage charged with maintenance, then to children, 176, 339, 355, 356, 364, 380.

BLANKS IN WILLS,
*construction in case of*, 15.
*filling up*, 15, 49.

BLIND TESTATOR,
*execution of will by*, 19, 99.

BODY,
disposal of, after death, direction as to, 448.
*disposal of, after death, direction as to*, 448.

BONA QUÆ IPSO USU CONSUMUNTUR,
*gifts of*, 128, 386.

BOND,
*resignation of church living, for*, 480.

BONUS,
*on shares, etc.*, 369.

BOOKS,
*pass under what general description*, 272.

BRITISH MUSEUM,
*devises of lands to*, 371.

BUILDING,
erection of, power of trustees to carry on, 383.

BUILDING LAND,
development of, powers for, 501.
specific bequest of leasehold, 446.

BUILDING LEASES,
power to lend money to builders who take, 501.
take land on, 383.

BURIAL,
direction as to, 210, 448.
*direction as to*, 448.

BURNING,
dead body, direction as to, 448.
*dead body*, 448.
*revocation of will by*, 44, 109.

BUSINESS OF TESTATOR. See EXECUTORS, PARTNERSHIP.
bequest of, 335.
books of, bequest of, 464.
capital in, power to increase, 338, 349, 354, 363, 365.
carrying on, directions to wife for, 338, 342, 354, 363, 399.
remuneration for, 338, 343.
trustees' powers of, 338, 343, 348, 355, 363, 385.
company limited by shares, formation of, to take over, 350.
discontinuance of, discretion of trustees as to, 338, 363.
employment in, option to son at 21 of, 342.
payment for, 342, 344, 350.
profits of, application of, 339, 343, 348, 355, 464, 500.
real estate belonging to, sale of, 384.
sale of, power of, 343, 350.
share in, bequest of, 464.
*executors carrying on*, 357 *et seq.*
*goodwill of, meaning of*, 464.
*plant of, meaning of*, 464.

CALLS,
*shares in joint-stock companies on*, 367.

CAMBRIDGE UNIVERSITY,
*devises of lands to*, 369.

CANCELLATION,
*wills, of*, 42, 109.

CAPACITY OF TESTATORS,
*aliens*, 2, 3, 91.
*blind*, 19, 22, 99.
*deaf and dumb*, 19, 99.
*doubtful*, 96.
*felons*, 99.
*illness, impaired by*, 98.
*infants*, 8, 91.
*outlaws*, 99.
*real and personal estate, as to*, 89 *et seq.*

CATHOLICS,
*propagation of faith of Roman, gifts for*, 374.

CESSER. See ALIENATION.

CHANCELLOR OF THE EXCHEQUER,
*bequest to, for benefit of Great Britain held good*, 374.

CHARGE,
specific realty on, 456, 468, 476.
*debts or legacies on real estate, of*, 457, 535 *et seq.*
*multiplication of, in trusts by reference*, 477.
*upon and exception from a devise, distinction between a*, 208.

CHARITY,
bequest to, 214, 362, 452.
*accumulation by*, 372.
**gifts to**, 370 *et seq.*
*cy-près executed*, 372.
*Ireland, in*, 371.
*land of*, 370.
*British Museum, for*, 371.
*clergy, to endow or augment income of*, 371.
*Queen Anne's Bounty, for*, 371.
*recreation grounds, for*, 371.
*money to be laid out on land, of*, 369, 370, 371.
*redeem land tax, of*, 371.
*Mortmain and Charitable Uses Act*, 1888, *under the*, 369.
*Mortmain and Charitable Uses Act*, 1891, *under the*, 369,
*personalty, of*, 371, 372.
*objects of, dissenters as*, 374.
*dogs as*, 373.
*horses as*, 373.
*Jews as*, 374.
*Romanists as*, 374.
*Vivisection Society as*, 373.
*perpetuity in case of*, 372.
*what is a*, 372.

CHATTELS,
*consumable, gifts of*, 128, 386.
*heirlooms as*. See HEIRLOOMS.
*local description applied to bequest of*, 273.
*meaning of*, 165.
*and effects*, 166.

CHATTELS REAL. See LEASEHOLDS.

CHILD-BEARING,
declaration as to age of, 218.
*age when, ceases*, 244.
*presumption against, in case of advanced age*, 245.

CHILDREN. See ADVANCEMENT, BEQUEST, DEVISE, GUARDIANS. MAINTENANCE, MARRIAGE.
postponement of distribution in order to let in, 218.
*gifts to class of*, 245 *et seq.* See CLASS.
*construction of*, 203.
*lapse of*, 77, 78, 110, 111. See LAPSE.
*unborn*, 323 *et seq.* See PERPETUITIES.
*illegitimate*, 235 *et seq.* See ILLEGITIMATE CHILDREN.
*issue, and.* See SUBSTITUTION.
*vesting postponed beyond majority of*, 332.

CHOSE IN ACTION,
*ademption of bequest of*, 464.
*specific legatee of*, 3.
*words including*, 165.

CHURCH LANDS,
*augmentation of, gifts for*, 371.

CHURCH TRUSTEES,
legacies to, 452.
*incorporation of, and legacies to*, 452.

CLASS. See BEQUEST.
*ascertaining, rules for*, 245 *et seq.*
*death of member of*, 319.
*en ventre sa mère, child as member of a*, 250.
*extension and restriction of*, 248.
*gifts to a, form of*, 248.
*lapse in case of gifts to a*, 78, 111.

CLERGY,
*income of, devises to provide or augment*, 371.

CODICIL. See REVOCATION.
appointing a trustee and executor in place of one dead, 440.
confirming will, 440.
death of intended beneficiary, made because of, 516.
reviving will previously revoked, 515.
revoking appointment of trustees and substituting others, 432.
*confirmation of*, 432 *et seq.*
*will by*, 432 *et seq.*
*cumulative gift by*, 438.
*definition of*, 432.
*incorporating invalid will or codicil*, 433.
*invalid will or codicil, validating*, 433.
*meaning of*, 432.
*mistake in*, 435.
*date of will, as to*, 439.
*prior will or, validating*, 434.
*identification for purpose of*, 433.
*probate of*, 432.
*some, excluding others*, 54.
*revival by, of adeemed legacy*, 402.
*revoked codicil*, 433.
*will*, 53, 433.
*will executed before* 1838...80.

COLLECTOR,
*debts and rents of, appointment of*, 359.

COLONIES,
*how affected by Wills Act*, 80, 81.

COMMENCEMENT,
of wills, forms of, 442.

COMMON,
*tenancy in, words creating*, 224.

COMPANY,
formation of, to take over testator's business, 350.

COMPETENCY. See CAPACITY OF TESTATORS, WITNESSES.

CONDITION,
disputing will, against, 508.
name and arms, compelling use of, 414, 498.
*breach of*, 424.
*relief against*, 425 *et seq.*
*change of circumstances in testator's life, how affected by*, 394.
*consent, requiring*, 392 *et seq.*
*contingent gift, attached to*, 422.
*disputing will, against*, 424, 508.
*framing*, 419.
*gift over on non-performance of*, 424.
*relief against forfeiture where no*, 425 *et seq.*
*ignorance of*, 421.
*impossibility of fulfilling*, 393, 421.
*personalty, attached to*, 421.
*realty, attached to*, 421.
*in terrorem*, 392.
*malum in se, which is a*, 422.
*prohibitum, which is a*, 422.
*marriage, restraining*, 392 *et seq.*
*name and arms, enjoining use of*, 419 *et seq.*
*non-compliance with*, 420.
*gift over on*, 424.
*performance of, time allowed for*, 421.
*precedent*, 421, 423.
*concurrence of others, requiring the*, 424.
*recurring*, 420.
*repugnant*, 422.
*residence, enjoining*, 420.
*subsequent*, 415, 423.
*tail, attached to estate*, 423.
*time allowed for performance of*, 421.

CONFIDENCE.
expression of, not creating a trust, 214.

CONFIRMATION,
marriage settlement of, 431.
will, by codicil of, 432.
*will, by codicil of*, 437.

CONFIRMATION OF SALES ACT, 1862.
*sect.* 2 (*reservation of rights*), 186.

CONSENT,
life owner, of, to varying investments. See INVESTMENT.
tenant of, to advancement of children. See ADVANCEMENT.
to sale. See SALE AND CONVERSION.
parent or guardian, of, to marriage of infant, 217, 506.
*marriage requiring*, 392 *et seq.*

CONSTRUCTION,
*affirmation, of words of*, 163.
*class, of gifts to a.* See CLASS.
*clauses in the Wills Act*, 113.
*devise to one and his children or issue, of*, 474.
*trustees, of*, 65 *et seq.*, 116.
*enlarging bequest*, 165.
*context*, 161.
*failure of issue, of words importing*, 72, 115.
*general devise, of a*, 64, 115.
*illegitimate children, of gifts to.* See ILLEGITIMATE CHILDREN.
*indefinite devise, of, to pass the fee*, 115.
*liberal, of wills*, 90.
*occupancy, of references to*, 163.
*real estate, of words to embrace*, 160.
*relations, of gifts to*, 203 *et seq.*
*restraining context*, 160.
*suggestion, of words of*, 163.
*words, of particular.* See WORDS.

CONSUMABLE STORES,
bequest of, 170, 254, 263, 266, 270, 298, 361, 380, 458.
*absolute gift of*, 386.
*life interest in*, 386.
*specific or residuary gift of*, 387.

CONTESTING WILL,
condition against, 508.
*condition against*, 424, 508.

CONTINGENT ESTATE,
*devise of*, 5.
*income of*, 168.
*maintenance out of.* See MAINTENANCE.

CONTINGENT REMAINDER,
*executory devise or*, 246.

CONTINGENT WILL,
*validity of*, 14.

CONTRACT,
completion of a, without strictly good title, power of, 417, 484.
purchase of land, for, devise after, 3, 484.
sale of land, for, devise after, 484.

CONTRADICTIONS,
*in wills*, 451.

CONVERSION. See SALE AND CONVERSION.
actual produce of estate until, to be deemed income, 171, 175, 185, 255, 312, 488.
constructive, from testator's death, 171, 175, 185, 267, 285, 310, 355, 400, 417, 488, 506.

CONVERSION—*continued.*
*failure of purposes of*, 269.
*income until, right to*, 281 *et seq.*
*postponing, discretion as to*, 278.
*suspending, express authority as to*, 269.
*trusts for, rules as to*, 280.
*suggestions as to*, 279.

CONVEYANCING ACT, 1881:
*sect.* 4 (*contract, executor*), 483.
*sect.* 30 (*trusts estates*), 79, 398, 445.
*sect.* 35 (*sale and exchange*), 304.
*sect.* 36 (*trustees' receipts*), 144.
*sect.* 39 (*married woman, anticipation*), 244, 424.
*sect.* 42 (*management*), 419.
*sect.* 43 (*maintenance*), 180, 504.
*sect.* 44 (*powers of distress and entry*), 224, 259, 407, 419.

CONVEYANCING ACT, 1882:
*sect.* 10 (*restriction of executory limitations*), 475.

COPYHOLDS,
enfranchisement of, raising money for, 501.
executory devise of, to be settled with freeholds, 310.
reference to freeholds, devise by, of, 310, 415.
trustee of, devise by, 386.
*admittance to, compelling*, 159.
*assets for payment of debts, as*, 201.
*devise of*, 4, 101, 317.
*Court Rolls, on, entry of*, 6.
*general*, 64.
*trustee, by*, 387.
*without admittance*, 5, 102.
*surrender*, 4, 102.
*Locke King's Act, within*, 289.
*fines and fees on admittance and surrender of devised*, 5, 6, 7.
*power of appointment over, advantages of giving devisee*, 159.
*waste as a cause of forfeiture of*, 203.

CORPSE,
anatomical examination of, direction for, 447.
disposal of, by burial or burning, 448.
*anatomical examination of*, 447.
*disposal of, by burial or burning*, 448.

COSTS,
*administration action of*, 493.
*mortgage, of raising money under power to*, 419.

COURT ROLLS,
*entry on, of copy will on devise of copyholds, etc.*, 6.
*trusts*, 6, 7.

COUSINS,
*gifts to, construction of*, 204.

COVENANTS,
restrictive, on sale, power of trustees as to, 501.
*liability under, to build, repair, or pay fines for renewal*, 447.
*performance of, by intestacy*, 277.

CRANWORTH'S ACT, 23 & 24 Vict. c. 145 (repealed).
*sect.* 26 (*infant's maintenance*), 180.

CREMATION,
direction for, 448.
*legality of*, 448.

CROPS. See EMBLEMENTS.

CROSS-EXECUTORY LIMITATIONS. See ACCRUER, DEVISE.
amongst children, 286, 468.
grandchildren, 299, 302, 307.
several and their children, 218, 299.
sons and daughters, 306.

CROSS REMAINDERS. See DEVISE.
*limiting, mode of*, 223.
"*survivors*," "*others*," *use of words in*, 223.

CUSTOMARY ESTATES. See COPYHOLDS.

CY-PRÈS,
*doctrine of, perpetuity rule, as applied in case infringing*, 331.
*charity, in case of*, 372.
*executory trusts, in case of*, 397.

DATE,
*mistaken reference in codicil to, of will*, 440.

DAUGHTER. See BEQUEST, DEVISE.
appointment by, in favour of husband, 184, 298, 316, 412.
household furniture, use of, for unmarried, 151.
settlement of share of, 176, 183, 490.
*husband of, as to giving life interest to*, 127.
*settlement of, share of, proviso as to*, 186.

DAY,
*fractions of, in computation of time*, 260.

DEAF AND DUMB. See CAPACITY OF TESTATORS.

DEATH. See LAPSE.
*accidental, survivorship in case of*, 318.
*class of, members constituting a*, 321.
*substitution on*, 322.
*consent to marriage, of persons required to*, 393.
*issue, without*, 72.
*period to which words providing for, are to be referred*, 319 *et seq.*
*presumption of*, 511.
*will speaks from, as to estate comprised in it*, 57 *et seq.*

DEBENTURE STOCK,
*meaning of*, 57, 368.

DEBTOR,
legacy to, 462.
of mortgage and devise of mortgaged estate, 462.
*executor, appointed*, 443.
*legacy to, as to release of debt in case of*, 130, 462.

DEBTS,
bequest to debtor of, 462.
compound, power to, 336.
payment of, trust for, 142, 149, 151, 176, 183, 300, 309, 345, 351, 354, 407, 486, 489, 494.
devise to raise money for, 199, 366, 411.
satisfaction of, by legacy, declaration against, 270.
*charge of*, 535 *et seq.*
*cases in equity as to a*, 537.
*devise subject to a*, 536.
*executors' power and rights under a*, 536 *et seq.*
*general*, 537.
*collector of, employment of*, 359.
*compounding, executor's power of*, 146, 147.
*forgiving*, 462.
*liability to, of freehold, copyhold, and pur autre vie estates*, 7, 202.
*payment of, accumulation for*, 390.
*charge on real estate for*, 457, 535 *et seq.*
*direction for, effect on Locke King's Act of*, 290.
*liability to*, 7, 202.
*provision for*, 202.
*statute barred*, 202.
*trust for*, 202, 275, 536.
*release of*, 462.
*satisfaction of*, 274 *et seq.*
*legacies by*, 274.
*servants for wages, due to*, 276.

DECEASED WIFE'S SISTER'S MARRIAGE ACT, 1907...239.

DEDUCTION,
*gift free from, meaning of*, 196, 251.

DELUSION,
*impeaching will on ground of testator's*, 94.

DEPENDENT RELATIVE REVOCATION,
*doctrine of, explained*, 43.

DEPOSITORY FOR WILLS,
*living persons, of*, 543 *et seq.*

DESCENDANTS,
*gifts to, construction of*, 230.

DESCRIPTION,
*addition to definite, construction of words of*, 162, 163.
*construction of words of*, 162, 163.
*incorrect, illegitimate children, of*, 238.
*where intention apparent*, 449, 450.
*wife of*, 239.

DESIRE,
*words of, creating trust*, 225.

DESTRUCTION OF WILL. See REVOCATION.
*mistake, by*, 44.
*revoking, with intention of*, 44 *et seq.*, 110.

DEVISABLE,
*interests which are*, 2—4, 100 *et seq.*

DEVISE,
copyhold trust estates, of, 386.
cross-executory. See CROSS-EXECUTORY LIMITATIONS.
**on trust for**
brother, 200.
for life, remainder to his wife, then to their children, 210.
-in-law, and sister in fee, 212.
children and issue *per stirpes*, in fee, 476.
daughter and as she appoints, and in default for her children, 299.
in tail with cross remainders, 199.
married, of messuages, 142.
remainder to husband for life and issue in fee, 307.
with settlement of shares, 306.
debts, payment of. See DEBTS.
grandchildren, 299.
husband and wife for life, remainder to children as they appoint, and in default to children in common in fee, 473.
nephews as tenants in common in fee, 200.
nieces as tenants in common in tail, with cross-remainders between them, 210.
raising money in aid of personalty, 199, 298, 411, 470.
reference, by. See TRUSTS.
sale. See SALE AND CONVERSION.
sons and daughters successively in fee by way of executory use, 475.
for life remainder to his children in fee, 469.
strict settlement, in, 199, 406, 409, 471, 472.
**to**
children in fee, 475.
with cross executory limitations, 468.
as parents appoint, and in default to children equally, with executory gift over, 484.
younger, with executory limitations between them and eldest son, 264.
cousins equally in fee, 211.

DEVISE—*continued.*
**to**—*continued.*
nephews, 211, 212.
as tenants in common in fee, 212.
nieces as tenants in common for life with power to survivor to appoint, 212.
sister of a residence, remainder to her daughters, then to her son, 211, 212.
son for life, remainder to son's wife for life and their issue in fee, with cross executory limitations to first and other sons successively in fee, and if none to daughters, 307.
in fee, 138, 149, 285, 470.
charged with sum in aid of personalty, 298.
one being of age, the other a minor, 157.
subject to debts and legacies, 489.
successively charged with sum for brothers and sisters, 475, 476.
wife during widowhood, then to trustees to sell and form part of residue, 297, 309.
for life, remainder to children in fee, with cross executory limitations, 306.
son absolutely, but, in event of his death under age, to wife absolutely, 254.
equally in fee, 149.
rent-charge, of, reducible on marriage, 263.
*construction of, to one and his children or issue.* See CONSTRUCTION.
*contract for sale, after*, 482, 483.
*general.* See GENERAL DEVISE OR BEQUEST.
*lapse of.* See LAPSE.
*meaning of*, 90.
*onerous and beneficial, election as to*, 469.
*option to purchase, of land subject to*, 55.
*repugnant*, 451.
*residuary.* See RESIDUARY DEVISE.
*trust or mortgaged estates, of*, 397
*use and occupation, for*, 471.

DEVISEE,
*heir and conflicting claims of*, 203 *et seq.*
*misdescription or misnomer of*, 449.

DISPUTING WILL. See CONTESTING WILL.

DISSENTERS,
*gifts to*, 374.

DISTANCES,
*measuring, mode of*, 360.

DISTRESS AND ENTRY,
*powers of, supplied by Conveyancing Act*, 1881...224.

DISTRIBUTION,
equality of, to be regulated by trustees, 266.
in specie, 384, 459.
postponement of, in order to let in children, 218.
income of vested share to be paid during, 218.
*specific chattels, of, executors' discretion as to*, 268.
*substituted issue surviving period of*, 224.

DIVIDENDS,
*apportionment of*, 187.
*shares bequeathed, on*, 368.

DIVORCE ACT,
*will under, of married woman judicially separated*, 139.

DOMICILE,
declaration by testator as to his, 442.
*acquired*, 524.
*administration, how affected by*, 527.
*allegiance distinct from*, 519
*cases on*, 528.
*choice of*, 524.
*abandonment of*, 526.
*definition of*, 524.
*peer, of*, 524.
*declaration by testator as to his*, 442.
*distribution as affecting*, 529.
*evidence of*, 525.
*immovables, as affecting will of*, 519 *et seq.*
*kinds of*, 519.
*Kingsdown's Act (Lord), as affecting*, 530.
*law, by operation of*, 520.
*ambassador, of*, 523.
*consul, of*, 523.
*ecclesiastic, of*, 523.
*exile, of*, 523.
*fugitive, of*, 523.
*illegitimate child, of*, 522.
*lunatic, of*, 522.
*minor, of*, 521.
*officer, of, naval or marine*, 522.
*public*, 522.
*prisoner, of*, 523.
*servant, of*, 522.
*wife, of*, 520.
*legacy duty, as affecting liability to*, 527.
*marriage, validity of, in its effect on*, 529.
*movables, as affecting will of*, 88, 519 *et seq.*
*origin, of*, 520.
*personalty, as affecting will of*, 519, 529.
*realty, as affecting will of*, 519.
*two*, 529.

DONATIO MORTIS CAUSA,
*Wills Act does not apply to*, 118.

DOWER ACT, 1835,
*provisions of the*, 4.

DRUNKENNESS,
*testamentary incapacity arising from*, 95.

DUPLICATE WILLS,
*cases on*, 47.

DURESS,
*will procured by, invalid*, 98.

DURHAM UNIVERSITY,
*devises of lands to*, 369.

DUTY. See PROBATE DUTY, LEGACY DUTY, SUCCESSION DUTY.

DWELLING-HOUSE. See RESIDENCE.
devise of, to wife during widowhood, with use of furniture, &c., she insuring and keeping in repair, 297, 310, 355.
devise of, to sister for residence, 210.
permission for wife to reside in, for six months, the executors to keep up the establishment for that period, 416.

EASEMENTS,
"*usually enjoyed*," *meaning of*, 158.

ECCENTRICITY,
*testator, of*, 95.

EDUCATION. See MAINTENANCE AND EDUCATION.

EFFECTS, 160, 166.

ELDEST,
younger son becoming, provision in case of, 453.
*male lineal descendant*, 230.
*son*, 230, 500.

ELECTION.
*onerous and beneficial gifts, in case of*, 469.

EMBLEMENTS,
*belong to whom*, 404.
*farming stock, in case of bequest of*, 404.
*what are*, 404.

EN VENTRE SA MERE,
*claims of child*, 250.
*guardian of child, appointment of*, 518.
*illegitimate child*, 236.
*interest on legacy to child*, 257.
*rents accruing due before birth of child*, 169.

ENTAIL. See DEVISE, ESTATE TAIL.
*bar of*, 203.
*married woman restrained from alienation, by*, 241.
*direction to, mode of carrying out*, 396.
*personalty, effect of attempt to*, 427.
*subject of, what may be the*, 203.

ENTREATY. See PRECATORY WORDS.

ENTRY. See DISTRESS.
*right of, devise of*, 5, 100.

ERASURES,
*will, in*, 48, 49.

ESCHEAT,
*abolished for treason or felony*, 99.

ESTATE,
*what the word embraces*, 160.

ESTATE PUR AUTRE VIE,
*assets is*, 7.
*devise of*, 4, 102.
*special occupant never comes into existence, who entitled if*, 8
*Wills Act, operation of, on*, 76.

ESTATE TAIL. See ENTAIL, LAPSE, TENANT IN TAIL.
protectors of, appointment of, 481.
*devise of*, 100.
*lapse of*, 77, 112.
*protectors of*, 482.
*new, appointment of*, 482.
*number allowable of*, 482.
*responsibility of*, 482.
*survival of office of*, 482.

ET CÆTERA,
*force of, in a bequest*, 233.

ETON COLLEGE,
*devises of land to*, 369.

EVIDENCE,
*advances, of*, 403.
*cumulative or substitutional legacies, as to*, 438.
*domicile, of*, 525.
*executors, of appointment of*, 444.
*experts, of*, 50.
*extrinsic, as to admission of*, 16, 48, 53, 434, 438.
*identifying prior will or codicil*, 433.
*release of debt, of, in case of legacy to debtor*, 462.
*secondary, of contents of lost or destroyed will*, 43 *et seq.*

EVIDENCE ACTS, LAW OF,
*exemption from, of Wills Act*, 38.

EXCEPTION,
*bequest, from, effect of*, 166.

EXCLUSIVE POWERS. See POWERS.

EXECUTION,
*powers of appointment, of.* See POWERS.
*wills of*, 3, 10, 82 *et seq.*, 103 *et seq.*
*abroad*, 442.
*alterations in*, 48.
*directions as to*, 136.
*disclosure of nature of instrument on*, 35, 105.
*evasion of provision of Wills Act as to*, 19, 107.
*evidence of*, 27, 28.
*sealing, by*, 21.
*witnesses at.* See ATTESTATION, WITNESSES.

EXECUTOR,
appointment of, 138, 143, 149, 151, 157, 170, 175, 182, 192, 201, 210, 255, 263, 268, 270, 288, 304, 317, 336, 337, 341, 352, 357, 367, 386, 401, 406, 418, 432.
special, 335, 338, 445, 446.
trade, 335, 338, 348, 445.
substitution on death, &c., of, 348.
empowered to give away articles of small value, 459.
gifts to, 182, 215, 253, 288, 337, 343, 348, 444, 448.
indemnity to trade, 348.
substitution of, for those previously appointed, 345, 432, 440.
*appointment of debtor as*, 445.
*extrinsic evidence of*, 443.
*invalid*, 443.
*mode of*, 443.
*new*, 353.
*revocation of*, 440, 443.
*second set of*, 443.
*special, reason for*, 446.
*debts, power to compound*, 146.
*employ collectors of*, 359.
*pay, under charge on real estate*, 535 *et seq.*
*distribution of chattels, discretion as to, of*, 268.
*emblements, right to, of*, 404.
*gifts to*, 226, 231.
*legacies, time for payment of, by*, 193.
*to*, 231.
*lapse of*, 231.
*trade, as remuneration for carrying on*, 358.
*limitation, as a word of*, 228.
*married woman as*, 138.
*appointment by, of*, 139.
*payment of*, 359.
*special, debt, of a particular*, 397, 445.
*reason for appointment of*, 446.
*trust or mortgaged estate, of*, 397.
*substitution of, on death*, 352.

EXECUTOR—*continued.*
*trading*, 357 *et seq.*
*agents employed by*, 359.
*capital which may be used by*, 357.
*indemnity to*, 358.
*liability of*, 357, 358.
*remuneration of*, 359.
*undisposed of personalty, not entitled beneficially to*, 226.

EXECUTORS OR ADMINISTRATORS,
bequest to, when it is doubtful whether legatee be living or dead, 214.
*gifts to*, 226.

EXECUTORY DEVISES AND LIMITATIONS. See GIFTS OVER.
copyholds to be settled like freeholds, of, 310.
heirlooms, of, in certain events, 415, 495.
name and arms clauses, applied to, 414, 498.
sons successively in fee, to, 308, 472.
*contingent remainder or*, 246.
*estate tail, after*, 326.
*heirlooms, of chattels as*, 428, 496.
*rents before, take effect*, 168.
*restriction on*, 475.

EXECUTORY INTERESTS,
*devise of*, 5.

EXECUTORY TRUSTS,
*construction of terms in*, 397.
*cy-près, executed*, 397.
*entail, directing*, 397.
*framing*, 396.
"*usual powers*," *how construed in case of*, 397.

EXONERATION. See LOCKE KING'S ACT.

EXPENSES,
*testamentary, include what*, 493.

EXPERTS,
*evidence of*, 50.

FAC SIMILE,
*probate in*, 49.

FAILURE OF ISSUE,
*words importing, how to be construed*, 72, 115.

"FAMILY,"
*construction of word*, 205, 230.

FARM,
power to carry on, &c., 399.

FARMING STOCK,
*bequest of, what it carries*, 404.

FEE,
*passes by devise to trustees, when*, 71 *et seq.*
*separate use, settled to, devise of*, 139.
*waste by owner of defeasible*, 192.
*words of limitation, passing without*, 71, 115.

FELON,
*will by*, 99.

FEME COVERTE. See MARRIED WOMAN.

FINANCE ACT, 1894...528.

FINE. See COPYHOLD.

"FIRST MALE HEIR,"
*construction of devise to*, 230.

FIXTURES,
*household furniture, when included in bequest of*, 273.

FOREIGN LANGUAGE,
*will in*, 11.

FORFEITURE,
*alienation, on*, 240, 388, 455, 466. See ALIENATION, MARRIAGE.
*interference with management of estate, on*, 455.
*relief against, where no gift over on breach of condition*, 425.
*treason or felony, for*, 99.

FRAUD,
*impeachment of will on ground of*, 98.
*interpolations by, in a will*, 13.
*legacy void on ground of*, 239.

"FREEHOLD,"
*description, as a word of*, 162.

FRIENDLY AND INDUSTRIAL SOCIETIES ACTS,
*referred to*, 9.

FUNERAL,
directions as to, 210, 448.

FURNITURE. See HOUSEHOLD EFFECTS.
*comprises what*, 272, 273.

GENERAL DEVISE OR BEQUEST. See REAL ESTATE.
*copyholds, effect on, of*, 64.
*leaseholds, effect on, of*, 64, 114.
*operation of*, 64 *et seq.*, 101 *et seq.*
*power of appointment, effect on general, of*, 67 *et seq.*, 103.
*reversions and remainders in fee, effect on, of*, 387.

GENERAL POWERS, 65 *et seq.* See POWERS.

GESTATION. See PERPETUITIES.

GIFTS OVER. See EXECUTORY DEVISES AND LIMITATIONS.
*accruer clauses, in*, 292.
*condition, on non-performance of*, 424, 509.
*disputing will, on*, 508.
*heirlooms, of, on death of tenant in tail by purchase*, 428.
*marriage without consent, on*, 392.
*personal estate, in case of bequest of*, 392.
*real estate, in case of devise of*, 393.
*remoteness of*, 326.
*repugnant, when*, 422.
*what amounts to a*, 426.

"GOODS,"
*meaning of*, 165.

GOODWILL. See BUSINESS.
*of business*, 464.

GOVERNMENT ANNUITIES ACT, 1882.
*referred to*, 9.

GROUND-RENTS,
*freehold, investment in*, 430.

GROWING CROPS. See EMBLEMENTS.

GUARDIAN,
appointment of, 158, 179, 186, 255, 263, 270, 304, 317, 336, 352, 357, 367, 386, 401, 407, 418, 444.
*appointment of*, 261, 518.
*illegitimate children, to*, 261.
*married children, to*, 261.
*minor, by*, 261.
*mother, by*, 261.
*probate of*, 262.
*revocation of*, 261.
*benefits, to, by will*, 98.
*management of infant's estate by*, 518.
*mother becomes, when*, 261.
*survivorship of office of*, 261.

GUARDIANSHIP OF INFANTS ACT, 1886...261.

HEIR,
*gifts to*, 230.
*purchaser, taking as*, 160.

HEIRLOOMS,
executory limitation over of, in certain events, 415, 496, 497.
sale and exchange of, power of, 416.
settlement of chattels as, 415, 458, 496, 497.
*construction of gift of*, 496.

HEIRLOOMS—*continued.*
*executory trusts of chattels to be settled as*, 428, 496.
*framing gift of*, 428.
*gift over of, on death of tenant in tail by purchase*, 429.
*sale of, by tenant for life*, 429.

"HEIRS-AT-LAW, SHARE AND SHARE ALIKE,"
*construction of bequests to*, 230.

HOTCHPOT,
clauses providing for, 177, 183, 316, 345, 469, 491, 505.
*beneficiary bringing debt to testator into*, 465.
*clauses as to*, 493.

HOUSEHOLD EFFECTS. See HEIRLOOMS.
children after death of wife, to, 266, 311.
unmarried, to, with accruer, 460.
daughters, for use of spinster, 151.
inventory to be taken of, 266.
sale of, to wife at a valuation, 459.
various movables to wife, trustees to determine extent of bequest, 265, 458.
wife, to, 170, 182, 200, 253, 263, 266, 270, 297, 311, 335, 337, 355, 361, 379, 416, 458.
*construction of term*, 165, 272.
*consumable, should be given absolutely*, 386.
*fixtures when included in*, 273.
*locality, described by words of*, 273.

HUSBAND,
appointment in favour of, by married woman, 189.
power of. See POWER.
*wife and, construction of gifts to*, 206.

IDIOCY,
*testamentary incapacity from*, 93.

IGNORANCE,
*condition attached to gift, of*, 421.

ILLEGITIMATE CHILDREN,
trusts for, 216.
*description including legitimate and*, 235, 237.
*domicile of*, 522.
*gifts to*, 235 *et seq.*
*death duties payable on*, 239.
*en ventre sa mère*, 236.
*future*, 237.
*names, by their acquired*, 238.
*reputation in case of*, 236.
*maintenance of*, 260.

ILLUSORY APPOINTMENTS,
*validity of*, 467.

IMBECILE,
trust for, 219.
*testator*, 96.

IMPLICATION,
*gifts by*, 437.

IMPROVIDENT LEGATEE. See ALIENATION.
trust for, 217.

"IN OR NEAR,"
*meaning of*, 162.

INCAPACITY,
*to make a will*, 92 *et seq.*

INCOME. See CONVERSION.
actual annual produce of personal estate to be deemed, 255, 272, 417.
unsold real and personal estate to be, 170, 185, 222, 267, 313, 500, 506.
deficiency of, to be made out of corpus, 171.
profits of business, 349.
determination by trustees as to what is, 312.
*accumulations of.* See ACCUMULATION.
*annuity, of fund producing, deficiency of*, 195.
*apportionment of*, 187.
*cesser of, on alienation or bankruptcy*, 240, 388.
*contingent devise or bequest, of*, 168.
*corpus of fund when carried by gift of*, 72.
*maintenance for*, 180, 259.
*after majority*, 358.
*residuary bequest of, intermediate*, 168.
*sale until, of property directed to be sold*, 278 *et seq.*
*specific bequest of, before vesting*, 168.

INCONSISTENCY,
*testamentary instruments, in*, 451.

INCORPORATION,
*documents with will, of*, 17.

INCUMBRANCES. See LOCKE KING'S ACT.

INDEFINITE DEVISE,
*effect of*, 71, 72, 115.

INDEMNITY,
executors, to trade, 350.
trustees, to, special, 272, 367.
*clause deemed to be contained in every instrument creating trust*, 147.
*trade, to executors who carry on testator's*, 358.
*trustees, to, special*, 377.

INDUSTRIAL AND PROVIDENT SOCIETIES,
*wills by members of*, 8.

INFANTS,
*advancement of*, 265. See ADVANCEMENT.
*guardianship of*, 261. See GUARDIAN.
*legacies to, payment of*, 231.
*maintenance of*. See MAINTENANCE.
*wills by, invalid*, 8, 91.
*soldiers on active service, or seamen at sea, unless*, 30.
*witnesses to wills, as*, 24.

INFLUENCE, UNDUE,
*wills, obtained by*, 96.

INSANITY,
*incapacity from*, 93.

INSTALMENTS,
legacy to be paid by, 379, 380.

INSTRUCTIONS,
*charge of debts, as to*, 130.
*children, as to*, 124 *et seq.*
*conversion, as to trusts for*, 128.
*executing formally the, desirability of*, 135, 136.
*execution of will, as to*, 135.
*household goods, as to*, 128.
*incumbrances, as to*, 131.
*live stock, as to*, 128.
*objects of gift, as to*, 123.
*partnerships, as to*, 132.
*personal matters, on*, 122.
*property, as to nature and extent of*, 122.
*shares in realty, as to undivided*, 129.
*subjects of gift, as to*, 128.
*taken from whom, should be*, 122.
*trustees, as to powers of*, 131
*vesting, as to*, 125, 130.
*widow, as to provisions for*, 123.
*position of, in regard to children*, 124.
*wills, for, suggestions to persons taking*, 121 *et seq.*

INSURANCE,
direction that tenant for life shall effect, 298, 355.
policies of life, discretion as to postponement of sale of, 503.

INTENTION,
*of testator, to be gathered from will as a whole*, 118.

INTEREST,
payment of, direction as to, 253, 267, 449.
*advances, on*, 403.
*children, on legacies to*, 258.
*contingent legacies, on*, 256, 257, 258.
*creditor, to, on legacy in satisfaction of a debt*, 258.
*land, on legacy payable out of*, 257.

INTEREST—*continued.*
*legacies carrying*, 255 *et seq.*
*maintenance, for*, 258, 259.
*runs from time for payment of legacy*, 255, 256.
*specific legacies, on*, 256.

INTERLINEATIONS,
memorandum of, 514.
*execution of*, 48, 109.
*identification by codicil of*, 51.
*parol declarations of testator as to*, 48.

INTERPOLATIONS,
*fraud by*, 13.
*mistake, by*, 13.
*presumption as to time of making*, 48.

INTESTACY,
*covenants, performance of, by*, 277.

INTIMIDATION. See UNDUE INFLUENCE.

INVENTORY,
of furniture, &c., 266, 298, 459, 460.
plate, 191, 311, 337, 415.
*legatee for life of chattels, from*, 268.

INVESTMENT,
determinable, power to retain, 312.
hazardous, power to postpone conversion of, 507.
trust for, 466, 507.
consent of life owner to vary, 176, 185, 272, 303, 314, 489, 505.
in purchase of freehold lands to be settled, 417.
*authorised under Trustee Act*, 1893, 152 *et seq.*
*ground-rents, in freehold*, 430.
*hazardous, as to powers to retain*, 507.
*income until*, 278 *et seq.*
*real securities under Trustee Act*, 1893, *on*, 152 *et seq.*
*trust funds, of*, 152.
*vary, power to*, 154.

ISSUE,
*appointment to children and*, 474.
*death without, or without leaving*, 72, 115.
*executory trusts, how construed in case of*, 396.
*failure of, meaning of words importing*, 72, 115.
*lapse of gifts to, of testator*, 76, 111. See LAPSE.
*male, gifts to*, 230.
*minor dying leaving, as to providing for care of*, 358.
*possibility of, down to death*, 244.

JEWS,
*gifts to*, 374.

JOINT TENANT,
*wills by, as such, inoperative*, 101.
*except after severance or survivorship*, 101.

JOINT WILLS,
*not recognised as wills*, 510.

JOINTURE,
power to limit, 412.
rent-charge to wife in addition to, 409.
satisfaction of, provision in, 506.

JUDICIAL SEPARATION,
*will of married woman after*, 138.

KEBLE COLLEGE,
*devises of land to*, 370.

KING'S ACT. See LOCKE KING'S ACT.

KINGSDOWN'S ACT (LORD),
effect and operation of, 530 *et seq.*

"LANDS,"
*what the word comprises*, 161.

LAPSE,
direction in case of, 194, 448, 462.
*benefit of, as between heir and residuary legatee*, 206 *et seq.*
*children, of gifts to*, 76, 112.
*class, in case of gifts to a*, 113.
*conversion, direction for, where there is a*, 207.
*creditors, of legacies to*, 63.
*estates tail, of*, 75, 112.
*executors, of legacies to*, 209.
*issue of testator, of gifts to*, 76, 112.
*land, of legacies charged on*, 206 *et seq.*
*payable out of proceeds of sale of*, 206, 207.
*old law as to*, 110.
*provision against*, 318 *et seq.*
*residue, increase of, by*, 62, 111, 206 *et seq.*
*of gift of*, 208.
*rules as to, effect of*, 76, 111.
*what is*, 110, 111.

LAST WILL,
*meaning of*, 90.

LEASE,
*power to, under Settled Land Act*, 501

LEASEHOLDS. See BEQUEST, DEVISE.
bequest of, to one absolutely, 213.
for life, then to another absolutely, 200, 213.
fee of, raising money to purchase, 501.
general bequest of, subject to debts, and to prior life interest in part, 486.
settlement of, by reference to real estate, 406, 415.
specific bequest of, and special appointment of executor, 446.
*conversion of*, 278, 279.
*general devise including*, 63, 64, 387.
*lex loci as affecting will of*, 519.
*personal estate, are*, 90.
*renewable, powers of trustees as to*, 500.
*specific gift of, where testator subsequently acquires the fee*, 61.
*succession duty on*, 90.

LEGACIES. See BEQUEST.
charged on land, 199.
with provision for discharge, 454.
delivery and payment of, time for, 158, 182, 191, 200, 214, 253, 263, 270, 351, 448, 449, 460.
gift of pecuniary, 191, 201, 214, 218, 253, 263, 351, 380, 399, 407, 448, 449, 452.
specific, 191, 200, 213, 337, 361, 362, 444, 460, 463.
stock, 158, 217, 463.
interest on. See INTEREST.
lapsed, direction as to destination of, 194, 448, 462.
*abatement of*. See ABATEMENT.
*ademption of*. See ADEMPTION.
*cumulative or substitutional*, 438.
*lapse of*. See LAPSE.
*meaning of*, 90.
*payment of, time allowed for*, 193.
*for, direction as to*, 193, 274.
*priority of*, 274.
*satisfaction by, debts, of*, 274 *et seq.*
*portions, of*, 277.
*wages due to servants, of*, 276.
*wife, to, abatement of*, 274.

LEGACY DUTY,
payment of, direction for, 158, 222, 351, 460, 496.
*domicile as affecting liability to*, 527.
*exemption from, expressions involving*, 251.
*gift of, abatement of*, 251.
*illegitimate children, on gifts to*, 239.
*on plate, &c., given to persons in succession*, 497.
*purchase-money after exercise of option to purchase*, 55

"LEGAL PERSONAL REPRESENTATIVES,"
*gifts to*, 226 *et seq.*
*limitation, as words of*, 227.

LEGATEES,
*misdescription or misnomer of*, 449, 450.

LEX LOCI,
*disposition of, and succession to, real property and chattels real governed by*, 88, 519.

LIFE. See BEQUEST, DEVISE.
*legatee for, consumable stores of*, 386.
*security from*, 268.
*specie, when entitled in*, 281.

LIFE INSURANCE,
policies of, discretion as to sale of, 503.

LIMITATION, WORDS OF,
*fee passing without*, 72, 116.

LIMITATIONS, STATUTE OF,
*debts barred by, payment of*, 202.

LIS PENDENS,
*settled land as, registration of order of Court as to*, 179.

LIVING. See ADVOWSON, PRESENTATION.

LIVING PERSONS,
*depository for wills of*, 543.

LOANS,
to builders by trustees, 501.
son, 386, 399, 400.

LOCALITY,
*words of, applied to gifts*, 163–167, 273.
*construction of*, 165.

LOCKE KING'S ACT,
operations of, negatived, 509.
*contrary intention to provisions of, expressed in will*, 290 *et seq.*
*copyholds affecting*, 289.
*Crown in favour of, effect of*, 289.
*equitable mortgage within*, 290.
*expressions including*, 290 *et seq.*
*intention expressed in will to exclude*, 290 *et seq.*, 509.
*leaseholds within*, 290.
*lien for unpaid purchase-money not formerly within*, 289.
*mortgaged land primarily liable under*, 289 *et seq.*

LODGING HOUSES,
business of letting, 383.

LONDON UNIVERSITY,
*devises of land to*, 369.

LORD CRANWORTH'S ACT. See CRANWORTH'S (LORD) ACT.

LORD KINGSDOWN'S ACT. See KINGSDOWN'S (LORD) ACT.

LORD ST. LEONARD'S ACT. See ST. LEONARD'S (LORD) ACT

LOST WILL,
*contents of, how proved*, 46.
*probate of*, 47.

LUCID INTERVAL,
*testamentary act during*, 93.

LUNACY,
*after will made*, 92.
*domicile in case of*, 522.
*incapacity arising from*, 93 *et seq.*

MAINTENANCE AND EDUCATION,
account, without, payment of income to father for, 214, 215, 505.
contingent shares, out of, 218, 504.
general provisions for, 254, 364, 400, 412, 465, 503.
modes of, different, 286, 504.
option of trustees to apply income for, or to pay same to guardians, 217, 505.
rates of, at various ages, 381.
wife's life interest, charged on, 176, 338, 345, 349, 364, 381, 400, 489.
*accumulation, when allowed where there is prior trust for*, 180, 259.
*adults, for*, 358.
*clause imported into wills, when*, 180.
*still necessary in some cases*, 503.
*contingency, out of fund to which infant entitled on*, 180, 259
*corpus of fund, charged on*, 180.
*illegitimate children of*, 260.
*interest on legacies to infants for*, 259.
*majority, after*, 358.
*past*, 181.

MAJORITY,
*claim upon income after attaining, as to a*, 358
*vesting beyond, as to postponement of*, 332.
*shares of sons at twenty-one, or marriage*, 358.

MANAGEMENT,
minority of devisee, during, 157, 470.
powers of, general, 507.
sale and conversion, pending, 175, 185, 310, 488, 500.
special declarations as to power of, notwithstanding existence of charges, 487.
trustees for, 264, 413.
*direction to employ particular person in*, 131.
*minority, of land, during*, 419.
*trustees of trust affairs, by*, 377.

MARINERS AND SEAMEN,
*wills of*, 30 *et seq.*
*execution of*, 31 *et seq.*

MARK. See SIGNATURE.
*acknowledgment of*, 22.
*signature to will by*, 20.

MARRIAGE,
attestation of will immediately after, 515.
consent required previously to, 217, 506.
reduced annuity on, 300, 381, 494.
revival of will revoked by, 515.
settlement made on, confirmation of, 431.
*conditions, subject to*, 392 *et seq.*
*personal estate, in case of bequest of*, 392.
*real estate, in case of devise of*, 393.
*consent before, gift subject to*, 394 *et seq.*
*domicile, how affected by*, 529.
*gift over on, without consent*, 394.
*nullity of, bequest to widow where there is*, 395.
*restraining, condition*, 393 *et seq.*
*revocation of will by*, 38, 108.
*until, gift*, 392.
*validity of, how affected by domicile of contractors*, 529.

MARRIED WOMAN,
appointment, power of, given to, 142, 177, 183, 211.
exercise of, by, 189.
conditional will of, in event of not having issue, 189.
payments to, direction as to, 433.
separate property of, direction as to, 190, 215.
*alienation by.* See ALIENATION.
*anticipation of income by*, 241 *et seq.*
*breach of trust at request of*, 244.
*capacity of, to make a will*, 9, 91, 138 *et seq.*
*Divorce Act, under*, 139.
*Married Women's Property Act*, 1882, *under*, 9, 92, 138.
*Wills Act, under*, 9, 92.
*executor, as*, 138.
*will appointing, by*, 139.
*gift to, under M. W. P. Act*, 1882...138.
*judicially separated, will of*, 139.
*personal estate not settled to separate use of, bequest of*, 139.
*power, under, will of*, 9.
*date of*, 60.
*general, exercise of, by*, 67.
*protection order, will after, by*, 139.
*restraint on alienation by.* See ALIENATION.
*separate property of, paid to husband*, 278.
*meaning of*, 9.
*separate use of, gifts to*, 138, 197.
*personal estate settled to, bequest of*, 140.
*fee simple settled to, devise of*, 139.

MARRIED WOMEN'S PROPERTY ACT,
*of* 1882...9, 10, 68, 81, 138, 197, 244.
*of* 1893...10, 62, 91, 139, 244.
*gifts under, without intervention of trustees*, 138.
*separate use*, 197.

MEASUREMENT,
*mode of, distances*, 360.
*time*, 260.

MEDICAL ATTENDANT,
*benefited by will*, 98.

MEMORANDUM,
alterations and interlineations in will of, attested, 514.
*advances, of, unattested*, 403.
*debts, as to release of*, 462.

"MESSUAGE,"
*meaning of*, 161.

MINES, MINERALS,
sale of, apart from the surface, 184, 487.
*sale of, apart from surface*, 186.
*waste, in case of*, 192.

MINOR. See ADVANCEMENT, GUARDIANS, INFANTS, MAINTENANCE
*domicile of*, 521.
*legacies to, payment of*, 231.
*emancipation of*, 521.
*incapacity of, to make a will*, 8, 91.
*unless soldier or seaman*, 30.
*witness to will, as*, 24.

MISDESCRIPTION,
*persons in wills, of*, 449.

MISNOMER,
*persons in wills, of*, 449.

MISSING WILL, 46.

MISTAKE,
*wills or codicils, in*, 13, 437, 438, 450.

MONEY,
*charity, bequest to, of*, 369 *et seq.*
*ready, what is meant by*, 234.
*security for*, 234.
*stock, as a word to describe*, 233.

MONOMANIA,
*of testator*, 94.

MORTGAGE,
exoneration from, of devised estate, 157.
power to, for purposes of advancement, 264.
raise money by, 380, 501.

MORTGAGE—*continued.*
proviso as to, and costs of transfer, 501.
trust to raise money by, in aid of personal estate, 199, 366.
*costs of, power to raise,* 419.
*liability of mortgaged land to, primary,* 288 *et seq.*
*Locke King's Act, effect of, on.* See LOCKE KING'S ACT.

MORTGAGED ESTATES,
*devise of,* 397.
*special executor of,* 397.

MORTGAGEES,
*devise by,* 397.

MORTMAIN. See CHARITY.

MOURNING,
executors to provide, for testator's family, 380.
pecuniary legacy to wife for, 361.
servants, to, gift of, 449.

MOVABLES,
*will of, governed by lex domicilii,* 88, 519.

MUTILATION,
*of will,* 42 *et seq.*

MUTUAL WILLS,
of two sisters, each for the benefit of the other, 510.
*joint, and, distinction between,* 510.
*tenancy severed by,* 510.
*mistake in signature of,* 510.

"MY,"
*effect of using word, to designate particular property,* 58, 59.

NAME,
*assuming a,* 419.
*next of kin of a particular, gift to,* 230.
*wrong, gifts in,* 449.

NAME AND ARMS,
clauses providing for assumption of, 414, 498.
*use of, framing clauses enjoining,* 419 *et seq.*
*recurring condition as to,* 421.

NATURAL CHILD. See ILLEGITIMATE CHILDREN.

NATURALIZATION ACT, 1870.
*aliens, will of, under,* 2, 91.

NAVY AND MARINES (WILLS) ACT, 1865...32 *et seq.*

NEPHEWS AND NIECES,
*gifts to, construction of,* 204.

NEXT OF KIN,
trust for, 143, 178, 184, 287, 316, 364, 491, 493.
*entitled under gift to "legal" or "personal representatives," "executors or administrators," when*, 226.
*gifts to*, 235 *et seq.*, 376.
*residuary legatee and, conflicting claims of*, 229
*wife and representatives of next of kin when entitled under gift to*, 229.

NEXT PRESENTATION,
bequest of, 478.

NIECES,
*gifts to, construction of*, 204.

NOMINATIONS,
*by small intestates, acts relating to*, 9.

NOW,
*reference of this word to date of will or death of testator*, 58.

OBLITERATION,
*in wills*, 48 *et seq.*, 109.
*identification by codicil of*, 51.
*substitution, with unattested*, 50.
*without*, 50.

OCCUPANCY. See CONSTRUCTION.

OCCUPATION,
*use and devise for*, 471.

"ONLY WILL,"
*revocation of prior wills, by use of words*, 442.

OPTION,
business, to sons successively to take over, 338, 349.
at twenty-one of employment in, 342
of trustees as to payment of income to parent or guardian of children interested, 218, 504.
to purchase, 366, 384, 485.
*to purchase*, 55.

"OR,"
*read "and," when*, 317.

"OTHERS,"
*accruer clauses, in, use of word*, 292 *et seq.*
*cross-remainders, as a word for limiting*, 223.

OUTLAWRY,
*abolished in civil proceedings*, 99.

OUTLAWS,
*disability of, to make wills*, 99.

OXFORD UNIVERSITY,
*devises of land to*, 369.

PAROL EVIDENCE. See EVIDENCE.

PARTNERSHIP. See BUSINESS.
accounts of, settling, 385.
bequest of share in, 464.
real estate belonging to, pre-emption of, given to partner, 385.
settlement by trustees of affairs of, 367.
stock in trade of, sale of, 385.
succession of trustees to testator's share in, 385.
*share of profits as evidence of*, 346.

PARTNERSHIP ACT, 1890, sect. 2...346.

PECUNIARY AND SPECIFIC GIFTS. See SPECIFIC DEVISE AND BEQUEST.
*difference between*, 62.

PER INCURIAM,
*clause introduced into will*, 13.

PER STIRPES. See SUBSTITUTION, DEVISE, BEQUEST.

PERISHABLE PROPERTY. See CONSUMABLE STORES.
*conversion of*, 278 *et seq.*, 386.

PERPETUITIES,
*definition of*, 323.
*rule against*, 323 *et seq.*
*alternative gifts, how affected by*, 324.
*charities, how affected by*, 372.
*class, in its effect on gifts to a*, 326.
*cy-près doctrine applied to gifts infringing*, 331, 397.
*executory limitation after estate tail, how affected by*, 326.
*gestation, period of, when allowed for by*, 323.
*moulding gifts according to events to escape*, 323.
*possibility upon a possibility, rule of a, distinct from*, 329.
*powers of appointment, how affected by*, 328.
*powers of sale, when indefinite*, 333.
*remainder, as applied to a*, 333.
*restraint on alienation, how affected by*, 326.
*unborn persons, gifts to, infringing*, 327 *et seq.*

PERSONAL ESTATE. See BEQUEST.
*chattels and effects as words passing*, 166.
*debts, to payment of, liability of*, 457.
*definition of*, 89.

PERSONAL ESTATE—*continued.*
*description of, effect of particular words in the*, 387.
*domicile as affecting will of*, 519, 526.
*leaseholds are*, 90.
*marriage conditions in case of*, 393.
*meaning of, in Wills Act*, 2.
*separate use, settled to, will of*, 139.
*soldier's and seaman's will of*, 30 *et seq.*

"PERSONAL REPRESENTATIVES,"
*gifts to*, 226 *et seq.*

PLANT,
*of business*, 464.

PLATE. See HEIRLOOMS, HOUSEHOLD EFFECTS.

POLICIES,
of life assurance, trustees' powers of dealing with, 502.
*Apportionment Act*, 1870, *does not apply to*, 187.

POOR,
*bequests for the benefit of the*, 371.

PORTIONS,
raising, trusts for, 411.
tenant for life, power given to, to charge with, 413.
*accumulation for raising*, 390, 391.
*ademption of legacies by*, 401, 402.
*double, leaning against*, 276, 277.
*satisfaction of, by legacies*, 277, 278.

POST MORTEM,
direction as to, examination, 447.

POSTHUMOUS CHILD. See EN VENTRE SA MÈRE.

POWERS,
**of appointment,**
children, given to, 143, 302, 315, 490.
married women, exercised by, in favour of husband and brothers and sisters, 189.
given to, 142, 143, 177, 183, 211, 299.
husband, in favour of, 183, 412, 491.
nieces given to, 211.
son and his wife and survivor, given to, 302.
given to, 299.
widow, given to, 178, 183, 313, 362, 457, 493.
*execution of*, 29, 104, 376.
*Wills Act, effect of, on*, 29.
*will under seal, by*, 29.
*exercise of*, 466.
*after-acquired*, 66 *et seq.*, 103.
*general devise or bequest, by*, 64 *et seq.*, 103.
*pecuniary legacies, by*, 69.
*illusory appointment, by*, 467.

POWERS—*continued.*
**of appointment**—*continued.*
*exercise of, married woman, by,* 9, 10.
*minor, by,* 91.
*premature,* 55.
*time for,* 55, 65, 66.
*exclusive,* 467.
*general, exercise of, general devise or bequest, by,* 64 *et seq.*, 103.
*married woman, by,* 67.
*old law as to,* 66.
*perpetuities, as affected by rule against,* 328.
*present law as to,* 66 *et seq.*
*what are,* 65.
*reservation of, to devisees in fee,* 159.
*special, exercise of, by Court on default of appointment,* 375.
*particular reference in will,* 69, 375.
*perpetuities rule, as affected by,* 328.
*of distress and entry supplied by Conveyancing Act,* 1881...224.
*management of land during minority.* See MANAGEMENT.
*sale, of trustees for,* 304.
"*usual*," *meaning of,* 397.

PRECATORY WORDS,
*effect of, to create a trust,* 225, 226.

PRE-EMPTION,
right of, partner, given to, 384.
sons successively at a valuation, to, 366, 485.
*right of, as to,* 55.

PREPARATION OF WILLS,
*suggestions as to,* 121 *et seq.*

PRESTON'S ACT,
*illusory appointments, as to,* 467.

PRESUMPTION,
*against double portions,* 276, 277.
*alterations in will,* 48.
*death of,* 511.
*in favour of due execution of will perfect on face of it,* 22 *et seq.*
*sanity of testator,* 92.
*issue down to death, of possibility of,* 244.
*revocation of will owing to non-production, of,* 46.

PRIORITY,
*legacies directed to be paid soon after death, of,* 274.

PRISONERS OF WAR,
*wills by,* 34.

PROBATE,
*codicils, of some, excluding others,* 54.
*fac-simile, in,* 49.
*guardians, of testamentary appointment of,* 262.

PROBATE—*continued.*
*incorporated in wills, of documents*, 18.
*lost will, of*, 47.
*real estate only, of will of*, 431.
*settlement incorporated with will, of*, 18.
*soldier's or seaman's unattested will, of*, 30.

PROFESSIONAL SERVICES,
power to charge for, 356, 419.
*charge for, by trustee*, 359.

PROPERTY,
*after-acquired, passes by will*, 57 *et seq.*, 100.
*meaning of word*, 160.

PROTECTORS. See ESTATE TAIL.
of estate tail, appointment of, 481.
new, 482.

PROVIDENT NOMINATIONS AND SMALL INTESTACIES ACT, 1883,
*referred to*, 9.

PUBLIC TRUSTEE ACT, 1906...174.

PUBLICATION,
*of will abolished*, 35.

PUNCTUATION,
*in wills*, 136.

PUR AUTRE VIE. See AUTRE VIE.

QUASI TENANT IN TAIL,
*wills by*, 100.

QUEEN ANNE'S BOUNTY,
*devises of land to*, 371.

RAILWAY SHARES. See SHARES.

REAL ESTATE. See DEVISE, CONVERSION.
allotment of, instead of sale, 384.
charge on, of legacy, 456, 476.
contracted to be sold, devise of, 483.
pre-emption of, right of sons to, 366.
purchase, power of trustees to, 382.
settled by reference. See TRUST.
*definition of, as used in the text*, 89.
*general devise of, operation of*, 64, 101.
*lex loci rei sitæ as governing will of*, 519.
*marriage conditions attached to devises of*, 393.
*meaning of, in Wills Act*, 2.
*passes under what words*, 160.

REAL SECURITIES,
*Trustee Act, under*, 152.

RECEIPT,
*trustees' power to give*, 146.
*Conveyancing Act*, 1881, *under*, 144.
*Lord Cranworth's Act, under*, 144.
*Lord St. Leonard's Act, under*, 144.

RECITAL,
contract for purchase of land, of, 483.
marriage settlement, of a, 431.
power of appointing real estate, of, 189.
settled funds, of, 190, 466.
separate property, by married woman of possession of, 189.
*gifts by*, 437.
*mistake in, effect of*, 449.

RECOMMENDATION. See PRECATORY WORDS.

RECREATION GROUNDS,
*personalty to provide or maintain, bequest of*, 371.

RE-EXECUTION,
*of will*, 27.

REFERENCE. See TRUSTS.

REGISTRATION,
*wills, of, in Yorkshire and Middlesex*, 143.

RELATIONS,
*gifts to*, 203, 205, 230.

REMAINDERS,
*cross, mode of limiting*, 222.
*general devise, effect of, on reversions and*, 387.
*remoteness, rule against, applied to*, 334.

REMOTENESS. See PERPETUITIES.

RENT-CHARGE.
life, for, 409.
payable weekly to cease on alienation, 212.
power to limit, to husband, 412.
wife, for, 406.
in addition to jointure, 409.
reducible on second marriage, 263.
*legal, created by words "to the intent,"* 419.

RENTS,
collectors of, power to appoint, 356.
payment by executors of, of house occupied by wife, 363.
*apportionment of.* See APPORTIONMENT.
*executory devises take effect, before*, 168.
*posthumous heir, right of, to*, 169.

REPRESENTATIVES,
*gifts to "legal or personal," how construed*, 226.

REPUGNANCY. See CONTRADICTIONS.
*conditions annexed to estates, of*, 422.

REPUTED SON,
trusts of a pecuniary legacy for, 216.

REQUEST. See PRECATORY WORDS.

RESIDENCE. See DWELLING-HOUSE.
trustees within certain limits, of, 356.
*conditions of, attached to devisee*, 420.
*Settled Land Act*, 1882, *effect of, on*, 420.
"*use and occupation*," *of, meaning of*, 471.

RESIDUARY BEQUEST,
*consumable articles of*, 387.
*distinguished from specific bequest*, 62, 168, 283.
*exceptions in, effect of*, 166.
*framing, caution as to*, 387.
*income of, intermediary*, 168.
*portions satisfied by*, 277.

RESIDUARY DEVISE,
*disclaimed devise as part of*, 63.
*lapsed devise included in*, 62, 112.
*specific remains*, 61.
*void devise included in*, 62, 112.
*what is a*, 62 *et seq.*

RESIDUARY LEGATEE,
*meaning of*, 160.
*next of kin and, conflicting claims of*, 229.

RESIDUE. See BEQUEST, DEVISE.
*cases on*, 167.
*construction of word*, 167.
*lapsed devise falls into*, 62, 206.
*satisfaction of portions by bequest of*, 274.
*gift of, by subsequent portion*, 402.
*specific nature of devise of*, 61.
*void devise falls into*, 62, 112.

RESIGNATION BOND,
direction as to taking, 479.
*church living, of*, 480.

RESTRAINTS,
*on alienation.* See ALIENATION.
*marriage.* See MARRIAGE.

REVERSIONARY INTERESTS,
postponement of sale of, 309.

REVIVAL,
codicil by, of revoked will, 515.
*codicil by*, 53, 432.
*ademption after*, 402.
*destruction of revoking instrument, by*, 52.
*implied, abolished*, 52.
*loss of revoking instrument, by*, 53.
*mode of*, 53, 112.

REVOCATION. See CODICIL.
appointment of trustees, of, 432.
of former will, 138, 142, 149, 151, 157, 160, 175, 182, 192, 201, 210, 255, 264, 268, 270, 288, 304, 317, 336, 346, 352, 357, 367, 386, 401, 419.
separate instrument, by, 515.
*executor or trustee, of appointment of*, 432.
*of codicils*, 39 *et seq.*
*destruction of will, by*, 45.
*missing*, 46.
*consent of husband to wife's will*, 140.
*specific devises*, 54.
*wills, abandonment, by*, 42.
*alteration of estate, by*, 54, 108.
*burning, by*, 42.
*cancelling, by*, 42, 109.
*codicil, by*, 39.
*conditional*, 43.
*delegating power of*, 45.
*destruction, by*, 39 *et seq.*, 100.
*animus revocandi required for*, 44.
*marriage, by*, 38, 108.
*mutilation, by*, 42.
*non-production, presumed from*, 46.
*obliteration, by*, 39, 109.
*cutting*, 43, 45.
*pen and ink*, 43, 45.
"*only*" *by use of word*, 442.
*revival after*. See REVIVAL.
*subsequent conveyance, by*, 54, 109.
*will, by*, 39, 108.
*inconsistent with former*, 40.
*in execution of a power*, 39.
*tearing, by*, 42 *et seq.*
*seal*, 45.
*witnesses' names*, 45.
*writing executed like a will, by*, 42.
*powers of, exercise of*, 70.

RIGHTS OF ENTRY AND ACTION,
*devises of, respectively*, 5, 101.

ROMAN CATHOLICS. See CATHOLICS.

SAILORS,
*wills of*, 31 *et seq.*

SALE AND CONVERSION. See CONVERSION.
business of testator, of, 343.
stock in trade, 385.
consent of tenant for life required before, 267, 354, 362.
discretion of trustees as to, 222, 255, 365, 380.
postpone, power to, 171, 175, 185, 255, 267, 271, 300, 309, 312, 313, 355, 417, 488.
power of, 401.
trusts for, 142, 149, 151, 170, 175, 182, 211, 255, 264, 267, 271, 285, 300, 309, 312, 335, 338, 343, 351, 380, 459, 487, 488.
*heirlooms, of, by tenant for life*, 416.
*income until, right to*, 278 *et seq.*
*postponing, discretion as to*, 278, 493, 507.
*powers of trustees for, under Conveyancing Act*, 304
*indefinite validity of*, 333.
*trusts for, form of*, 179.
*suggestions as to*, 279.
*rules as to*, 280.

SANITY OF TESTATORS,
*presumption in favour of*, 92 *et seq.*

SATISFACTION,
debt by legacy, of, declaration against, 270.
jointure, of, 506.
*covenants, of, by intestacy*, 277.
*debts, of*, 274 *et seq.*
*legacies, of, by advancement or portions*, 401 *et seq.*
*portions, of*, 277, 278.

SAVINGS BANKS ACTS,
*provisions of, referred to*, 9.

ST. LEONARDS' (LORD) ACT, 22 & 23 Vict. c. 35,
*sect.* 12 (*execution of powers*), 29.
*sects.* 14—18 (*power of sale under charge of debts*), 535 *et seq.*
*sect.* 23 (*receipts of trustees*), 144.
*sect.* 31 (*trustees' indemnity*), 144.

SCHEDULES,
*adoption of, in wills*, 463.

SCHOOLS,
*establishment of, legacies for the*, 369.

SCOTLAND,
*excepted from the Wills Act*, 80, 118.
*land in, devise of*, 80.
*Thellusson Act applied to*, 388.

SEALING,
*execution of will by*, 23, 26, 29.

SEAMEN,
"*at sea*," *meaning of*, 31.
*who are, for purposes of sect.* 11 *of Wills Act*, 31.
*wills of*, 31.
*execution of*, 31.
*probate of unattested*, 29.

SECURITY,
*from conditional legatee*, 268.
*legatee for life of chattels*, 268.

SEISIN,
*meaning of*, 179.

SEPARATE PROPERTY,
*paid to husband*, 278.
*what is*, 9, 10.

SEPARATE USE. See MARRIED WOMAN.
*desirability of limitation to, in certain cases*, 197.
*fee simple settled to, will where*, 139.
*Married Women's Property Act, under, gift to*, 138.
*personalty settled to, will of*, 139.
*not settled to, will of*, 139.

SERVANT,
annuity to, 158, 454.
if in testator's service at his death, 191.
legacy to, if in testator's service at his death, 191, 215, 449.
*bequests to*, 232.
*wages due to, satisfaction by legacies of*, 275.

SETTLED LAND,
*order of Court as to, registration of, as lis pendens*, 179.
*sale of*, 179.
*tenant for life of, who is*, 179.
*powers of*, 179.
*what is*, 179.

SETTLED LAND ACT, 1882.
devise in settlement adopting provisions of, 406.
trustees under, appointment of, 157.
*sect.* 10 (*streets and open spaces*), 501.
*sect.* 17 (*sale of minerals*), 187.
*sect.* 25 (*improvements*), 501.
*sect.* 37 (*sale of heirlooms*), 430.
*sect.* 51 (*powers cannot be negatived*), 407, 420.
*sect.* 61 (*married women*), 244.
*Part. IV.* (*leases*), 501.

SETTLEMENT,
confirmation of, made on testator's marriage, 431.
daughters' shares of, 176, 183, 307, 315, 490.
direction for, 218.
real estate subjected to provisions of, 431, 476.
reference by. See TRUST.

SETTLEMENT—*continued.*
strict, devises in, 199, 406, 409, 471, 472.
trustees, power to make, of income of legacy, 218.
*confirmation of, effect of*, 17.
*discretionary power of, to trustees*, 396.
"*usual powers*" *in, what are*, 397.

SHARES,
bequest of, 362, 463, 464.
business in, bequest of. See BUSINESS.
calls on, direction as to, 362, 463.
*bonus on*, 369.
*calls on, payment by devisee or out of testator's estate of*, 367
*conversion of*, 507.
*dividends on*, 368.
*meaning of*, 57, 162, 368.

SHIFTING CLAUSE,
younger son becoming entitled to family estate, on, 499.
*operation of*, 500.

SIGNATURE,
*acknowledgment of*, 10, 22, 105.
*evidence of*, 23.
*sealing, by*, 23.
*amanuensis, by*, 21.
*attestation clause, in*, 106.
*cutting off*, 43.
*foot or end of will, at*, 19, 82, 104.
*form of*, 104.
*illness, in case of*, 20.
*initials, by*, 20.
*mark instead of*, 20, 105.
*place for*, 19, 82 *et seq.*, 105.
*several sheets to will, of*, 105.
*testimonium clause, in*, 83.
*time for*, 20.
*witnesses to see*, 20.
*presence of, at*, 21.
*wrong name, in*, 20.

SMALL INTESTACIES,
*acts relating to, referred to*, 9.

SOLDIERS,
*execution of wills of*, 30, 31.
"*active service*," *what is, for purposes of*, 31.
*wills of*, 30, 31, 104.

SOLICITOR,
bequest of books, drafts, and papers by, 464.
employment of particular, direction as to, 356, 419.
trustee allowed to charge profit costs, 356, 419.
*benefited by will*, 97.
*direction to executor to employ particular*, 133.

SOLICITOR—*continued.*
*executor*, 359.
*profit costs, authorised to charge, should not be witness*, 36, 359.
*trustee, remuneration of*, 359.

SPECIAL EXECUTOR. See EXECUTOR.

SPECIAL OCCUPANCY. See AUTRE VIE.

SPECIAL POWERS. See POWERS.

SPECIFIC DEVISE OR BEQUEST. See LEGACIES.
*ademption of*, 54, 109.
*consumable articles, of*, 386.
*creation of, words used for*, 58 *et seq.*, 62.
*income of, before vesting*, 168.
*interest on*, 255 *et seq.*
*leaseholds, of, where testator subsequently acquires the fee*, 61.
*"my" as a word denoting a*, 58, 59.
*option to purchase, effect of, on*, 55.
*pecuniary legacies distinguished from*, 62.
*residuary bequest, distinguished from*, 62, 168, 283.
*shares when not fully paid up, of*, 368.

SQUARES AND STREETS,
*power to lay out*, 500.

STATUTES CITED,
13 Ed. 1, c. 1 (*De Donis conditionalibus*), 100.
27 Hen. 8, c. 10 (uses), 419.
32 Hen. 8, c. 1 (wills), 100.
34 & 35 Hen. 8, c. 5 (wills), 91, 100.
4 & 5 Phil. & Mar. c. 24 (guardians), 261.
43 Eliz. c. 4 (charitable gifts), 373.
12 Car. 2, c. 24 (tenures, guardians), 2, 90, 261, 517.
14 & 15 Car. 2, c. 19 (Ireland, guardians), 2, 261.
22 & 23 Car. 2, c. 10 (distributions), 229, 376, 493.
29 Car. 2, c. 3 (frauds), 3, 102, 109.
2 & 3 Ann. c. 11 (Q. Anne's Bounty), 371.
7 Ann. c. 20 (Middlesex Registry), 143.
9 Geo. 2, c. 36 (restraint of inalienability of lands), 370, 372, 374.
25 Geo. 2, c. 6 (attestation of wills), 36.
36 Geo. 3, c. 52 (legacy duty), 128, 231, 251, 497.
39 & 40 Geo. 3, c. 98 (accumulations), 120, 372, 388 *et seq.*
42 Geo. 3, c. 116 (land tax, mortmain), 371.
43 Geo. 3, c. 107 (Q. Anne's Bounty), 371.
c. 108 (churches, church lands), 371.
45 Geo. 3, c. 84 (augmentation of income of clergy), 371.
51 Geo. 3, c. 115 (churches, residences for clergy), 371.
55 Geo. 3, c. 192 (copyholds), 102, 115.
5 Geo. 4, c. 39 (British Museum), 371.
7 Geo. 4, c. 66 (residences for clergy), 371.
9 Geo. 4, c. 94 (resignation bonds), 480.
11 Geo. 4 & 1 Will. 4, c. 40 (executors, residue), 227.
c. 46 (illusory appointments), 467.

STATUTES CITED—*continued.*
1 Will. 4, c. 40 (undisposed of residues), 227.
2 & 3 Will. 4, c. 75 (anatomy), 447.
3 & 4 Will. 4, c. 74 (fines and recoveries), 101, 115, 203, 482.
c. 104 (debts, realty), 201.
c. 106 (inheritance), 100, 160.
c. xxvii. (Thellusson's will), 120.
4 & 5 Will. 4, c. 92 (fines and recoveries, Ireland), 101, 115.
5 & 6 Will. 4, c. 62 (abolition of oaths), 106.
1 Vict. c. 26 (Wills Act), *passim*: at length, 1—81.
5 & 6 Vict. c. 35 (income tax), 196.
6 & 7 Vict. c. 37 (spiritual care of populous parishes), 371.
c. 85 (law of evidence), 38.
7 & 8 Vict. c. 94 (spiritual care of populous parishes), 371.
11 & 12 Vict. c. 36 (accumulations, Scotland), 387.
13 & 14 Vict. c. 94 (impropriation tithes), 371.
14 & 15 Vict. c. 97 (church building), 371.
c. 99 (law of evidence), 38.
15 & 16 Vict. c. 24 (Wills Act Amendment), 81, 104.
at length, 81.
16 & 17 Vict. c. 34 (income tax), 196.
c. 51 (succession duty), 90.
17 & 18 Vict. c. 113 (mortgaged lands, exoneration), 288 *et seq.*, 509.
18 & 19 Vict. c. 15 (registration of annuities), 196.
c. 43 (marriage settlements, infants), 127.
19 & 20 Vict. c. 104 (spiritual care of populous parishes), 371.
20 & 21 Vict. c. 77 (probate), 28, 543.
c. 85 (divorce), 139, 520.
22 Vict. c. 27 (recreation grounds), 371.
22 & 23 Vict. c. 35 (property law amendment, trustees' relief), 29, 144, 202, 377, 542. See St. Leonard's Act.
23 & 24 Vict. c. 145 (trustees' and mortgagees' powers), 144, 180. See Cranworth's Act.
24 & 25 Vict. c. 114 (wills of personalty, domicile), 29, 80, 442, 530.
c. 121 (wills, domicile), 533.
25 & 26 Vict. c. 108 (confirmation of sales by trustees), 186.
28 & 29 Vict. c. 72 (Navy and Marines, wills), 32.
c. 112 (Admiralty Acts, repeal), 81.
30 & 31 Vict. c. 69 (mortgaged lands, exoneration), 289.
31 & 32 Vict. c. 101 (title to land, Scotland), 80.
c. 109 (Church rates abolition), 452.
32 & 33 Vict. c. 46 (creditors, specialty and simple contract), 201.
c. 71 (bankruptcy), 455.
33 & 34 Vict. c. 14 (naturalization), 2, 91, 519.
c. 23 (forfeiture abolition), 99.
c. 35 (apportionment), 187.
35 & 36 Vict. c. 24 (incorporation of charity trustees), 371.
37 & 38 Vict. c. 35 (statute law revision), 81, 90.
c. 37 (appointments), 468.
c. 94 (conveyancing, Scotland), 80.

STATUTES CITED—*continued.*
38 & 39 Vict. c. 87 (land transfer), 143.
39 & 40 Vict. c. 30 (settled estates), 500.
40 & 41 Vict. c. 18 (settled estates), 397.
c. 33 (contingent remainders), 248.
c. 34 (mortgage, exoneration), 289.
42 & 43 Vict. c. 59 (civil procedure), 99.
44 & 45 Vict. c. 41 (conveyancing), 79, 144, 172, 180, 224, 244, 259, 304, 397, 407, 419, 424, 445, 483, 504. See CONVEYANCING ACT, 1881.
c. 47 (presumption of death), 512.
45 & 46 Vict. c. 38 (settled land), 179, 187, 244, 406, 407, 420, 430, 500. See SETTLED LAND ACT, 1882.
c. 39 (conveyancing), 172, 476. See CONVEYANCING ACT, 1882.
c. 75 (married women's property), 9, 10, 68, 80, 91, 138, 197, 244. See MARRIED WOMEN'S PROPERTY ACT, 1882.
46 & 47 Vict. c. 47 (provident nominations), 9.
47 & 48 Vict. c. 18 (settled land), 179, 397.
49 & 50 Vict. c. 27 (guardianship of infants), 261.
50 & 51 Vict. c. 30 (settled land), 397.
c. 40 (savings banks), 9.
c. 73 (copyhold), 398.
51 & 52 Vict. c. 42 (mortmain and charitable uses), 369.
c. 59 (trustee), 144.
52 & 53 Vict. c. 32 (trust investment), 133.
53 & 54 Vict. c. 39 (partnership), 346.
54 & 55 Vict. c. 73 (mortmain and charitable uses), 369.
55 & 56 Vict. c. 29 (technical and industrial institutions), 371.
56 & 57 Vict. c. 53 (Trustee Act), 144, 152, 172, 187, 244, 252, 500.
c. 63 (married women's property), 10, 62, 91, 139, 244.
57 Vict. c. 10 (Trustee Act), 186.
57 & 58 Vict. c. 30 (Finance Act), 528.
59 & 60 Vict. c. 25 (friendly societies), 9.
60 Vict. c. 15 (Navy and Marines' wills), 32.
60 & 61 Vict. c. 65 (land transfer), 32, 67, 74, 76, 113, 202, 431, 433.
61 & 62 Vict. c. 48 (benefices Act), 479.
6 Edw. 7, c. 55 (Public Trustee Act), 174.
7 Edw. 7, c. 47 (Deceased Wife's Sister's Marriage Act), 239.

STOCK. See BEQUEST, SHARES, TRUSTS.
bequest of, 158, 215, 463.
*annuity, for payment of*, 166.
*bank*, 233.
*bequests of*, 232.
*debenture, meaning of*, 57, 368.
*foreign funds, in*, 234.
*meaning of*, 233, 234.
*money, passing under bequest of*, 234.

STOCK-IN-TRADE,
power to sell, 386.

STREETS. See SQUARES.

STRICT SETTLEMENT. See DEVISE, SETTLEMENT.

SUBSCRIBE WILL,
*meaning of*, 23.

SUBSTITUTION,
children for deceased parent of, 152, 170, 178, 184, 212, 213, 270, 287, 303, 314, 336, 345, 364, 475, 492, 498.
executors, on death, etc., of, 348.
trustees, on death, etc., of, 440.
revocation of appointment of, 432.
widows and widowers of deceased children, of, 271.
*children for parents, of, as to surviving period of distribution on*, 223.
*class, on death of member of*, 318.
*executor, on death of*, 352.
*issue for child predeceasing testator, of*, 377.

SUCCESSION DUTY,
*exemption from*, 252.
*illegitimate children, on gifts to*, 239.
*leaseholds, on*, 90.

SUGGESTIONS,
*accruer clauses, as to framing*, 292 *et seq.*
*advancement, as to*, 133.
*annuities, as to*, 133.
*charge of debts, as to*, 132.
*class, as to gifts to a*, 132.
*codicils, as to preparing*, 134.
*conversion, as to trusts for*, 278.
*copyholds, as to*, 133.
*heirlooms, as to framing gifts of*, 428, 429.
*inspection of contract for purchase or sale*, 132.
*marriage settlement*, 132.
*partnership articles*, 132.
*title deeds*, 132.
*instructions for wills, as to formally executing*, 135.
*investment, as to*, 133.
*lapse, as to*, 133.
*legacy duty, as to*, 133, 250.
*name and arms clauses, as to*, 419 *et seq.*
*next of kin, as to gifts to*, 375.
*powers, general or special, as to*, 132.
*precatory words, as to*, 132.
*sale, as to trusts for*, 278.
*shares as to gifts of*, 367.
*survivorship, as to*, 132.
*trade executors, as to*, 357.
*wills, to persons taking instructions for and preparing*, 121 *et seq.*
*witnesses, as to who should be selected as*, 140.

SURPLUS,
*meaning of, gift of*, 167.

SURRENDER. See COPYHOLD.
*to use of will unnecessary, except in what cases*, 4, 101.
*without prejudice to right to fines*, 6.

SURVIVOR,
*cross-remainders as a word for limiting*, 223.
*general power given to, as to exercise of*, 60.
"*other*," *when construed in accruer clauses to mean*, 293 *et seq.*

SURVIVORSHIP,
*accidental death, in case of*, 319, 511.
*distribution, period of, by substituted issue*, 223.
*period of*, 293 *et seq.*
*presumption as to*, 511.

TAIL,
gifts of estate in. See DEVISE.
*condition attached to estate*, 423.

TAXES,
*gift of annuity "free from,"* 196.

TENANCY IN COMMON,
*words creating a*, 224.

TENANT FOR LIFE,
Settled Land Acts, under, exercise of powers of, 157.
*settled land, of, who is*, 179.
*Act, under exercise of powers by*, 407.
*waste, as to, powers of*, 192.

TENANT IN TAIL,
*conditions imposed on*, 423.
*heirlooms, of*, 428.

TERMS OF YEARS,
creation of, for securing jointures, portions, &c., 411.
*raise money to pay debts and legacies, to*, 201.
*rent-charge, to secure*, 419.

TESTAMENT,
*meaning of*, 90.
*wills in Wills Act extends to*, 1.

TESTAMENTARY,
*capacity in mental disease*, 96.
*expenses include what*, 493.
*writings, what are*, 11.

TESTIMONIUM CLAUSE,
forms of, 140, 512.
*signature of testator in*, 83.

THELLUSSON ACT, 388 *et seq.* See ACCUMULATION.

"THEN,"
*construction of, as pointing to event or as adverb of time*, 460.

"THINGS," 165.

TIMBER,
*what is*, 192.

TIME,
*computation of*, 260.
*fractions of a day in*, 260.

TOMB,
*repair of, gift for*, 373.

TRADE. See BUSINESS.

TRADE UNION AMENDMENT ACT, 1876.
*referred to*, 8.

TRINKETS,
gift of, to wife, 458.

TRUST,
reference, by, 287, 299, 303, 309, 407, 417, 431, 476, 497.
*accumulation for.* See ACCUMULATION.
*breach of, at instigation or request of married woman*, 244.
*debts, for payment of*, 202. See DEBTS.
*devise of, estates*, 397.
*entry on Court Rolls of, of copyholds*, 6.
*executory*, 396.
*precatory words as creating a*, 225.
*reference, by, multiplication of charges by*, 477.
*sale for, form of.* See SALE AND CONVERSION.

TRUST ESTATES,
devise of copyhold, 386.
*devise of, nugatory*, 397.
*special executor of*, 397.

TRUSTEE ACT, 1893,
*sects.* 1—9 (*as to investments*), 152—155.
*sects.* 10—12 (*as to appointment of new trustees*), 172—174, 252.
*sect.* 13 (*power to sell by auction*), 144.
*sect.* 14 ( *subject to depreciatory conditions*), 144.
*sect.* 15 ( *without excluding Vendor and Purchaser Act*, 1874, *s.* 2), 145.
*sect.* 17 (*power to authorise receipt by solicitor*), 145.
*sect.* 18 (*power to insure buildings*), 145.
*sect.* 19 (*power to renew leaseholds*), 146.
*sect.* 20 (*power to give receipts*), 146.
*sect.* 21 (*power to compound debts*), 146.
*sect.* 22 (*powers of two or more trustees*), 147.
*sect.* 23 (*exoneration of trustees in respect of certain powers of attorney*), 147.

TRUSTEE ACT, 1893—*continued.*
*sect.* 24 (*implied indemnity*), 147.
*sect.* 44 (*power to sanction sale of land and minerals separately*), 186.
*sect.* 45 (*breach of trust committed at instigation of beneficiary*), 244.

TRUSTEES. See PUBLIC TRUSTEE.
appointment of, 142, 157, 170, 182, 190, 199, 210, 253, 263, 266, 270, 285, 298, 306, 335, 337, 341, 352, 363, 401, 406, 444 *et seq.*
revocation of, 432.
sets of, 409.
copyholds of, devise by, 386.
distribution among legatees by, discretion as to, 266.
indemnity to, special, 272, 367.
management of real estate for, 264.
new, appointment of, 171, 186, 192, 201, 222, 253, 255, 264, 268, 272, 288, 303, 317, 356, 367, 418.
number limited on, 186, 192, 339, 345.
remuneration of, who carry on testator's business, 338.
residence of, clause as to, 356.
Settled Land Acts, under, appointment of, 157, 264, 407, 413.
solicitor. See SOLICITOR.
substitution by codicil of, in the place of those appointed by will, 432.
trading. See BUSINESS.
*appointment of, new*, 172 *et seq.*
*revocation of*, 432.
*continuing*, 172.
*death of*, 172.
*devises by, of trust estates*, 397.
*to, construction of*, 74 *et seq.*, 116.
*discharge of*, 173.
*estates taken by*, 75 *et seq.*, 116.
*executors also, effect of revocation of one of the appointments*, 440.
*indemnity to*, 147.
*special*, 376.
*investments by.* See INVESTMENT.
*management by*, 377.
*married women, in case of gifts to*, 139.
*new, appointment of*, 172 *et seq.*
*powers of*, 172.
*vesting property in*, 251.
*number of, increase of*, 172.
*varying*, 172.
*powers of, discretionary*, 133.
*remuneration of*, 359.
*solicitor*, 359.
*sale, for, powers under the Conveyancing Act of*, 304.
*sets of, separate*, 172.

TRUSTEE SAVINGS BANKS ACT,
*referred to*, 9.

UNATTESTED MEMORANDA,
*advances of*, 403.

UNBORN PERSON,
*cy-près doctrine as affecting gifts to*, 331 *et seq.*
*gift to, where void for remoteness*, 331 *et seq.*
*child of*, 331 *et seq.*
*vesting of shares of, beyond majority*, 332 *et seq.*

UNDUE INFLUENCE,
*exercise over testator*, 96.
*guardian of*, 98.
*medical attendant, of*, 98.
*solicitor, of*, 97.
*what constitutes*, 96.

UNIVERSITIES,
*devises of lands to*, 369.

UNMARRIED,
*ambiguity in use of the word*, 318.

UNSOUND MIND,
*will by person of*, 92.

USE AND OCCUPATION,
*devise for*, 471.

VALIDITY,
of will, condition not to dispute, 508.

VALUATION,
household effects, of, 459.
pre-emption at a, right of, 366, 384.
real estate, of, 366, 384, 486.
residuary estate, of, 365.
share in partnership concern, of, 464.

VARYING INVESTMENTS. See INVESTMENT.
*trustees' power of*, 154.

VESTING,
time of, direction as to, 214, 286, 314, 316, 339, 362, 381.
*chattels real in tenant in tail.* See HEIRLOOMS.
*children's shares, period of*, 125.
*direction as to, express*, 268.
*new trustees, property in*, 251.
*postponement of, beyond majority*, 332.

VICTORIA UNIVERSITY,
*devises of lands to*, 369.

VOID DEVISES. See LAPSE.

WARD. See GUARDIAN.

WASTE,
life estates to be without impeachment of, 189, 307, 309, 406.
*copyholds, as a cause of forfeiture of*, 203.
*defeasible fee, powers of owner of, as to*, 192.
*equitable*, 192.
*impeachment of, without*, 192.
*tenant for life, powers of*, 192.
*mines, in case of*, 192.
*ornamental timber, by cutting*, 192.
*tenant for life, by*, 192.

WASTING INVESTMENTS,
annual proceeds of, to be deemed income, 272, 312.
power to trustees to continue, 312.
*sale and conversion of*, 278 *et seq.*

WEARING APPAREL,
executors empowered to give away, 459.
servant, to, 191.

WESTMINSTER COLLEGE,
*devises of lands to*, 369.

WIDOW. See BEQUEST, DEVISE, MARRIED WOMAN.
*next of kin, not one of*, 229.
*nullity of marriage, in case of, bequest to*, 395.

WIFE. See BEQUEST, DEVISE, DWELLING-HOUSE, MARRIED WOMAN.
*abatement of legacy directed to be paid soon after death to*, 274.
*bequest to*, 149.
*bigamous, bequest to*, 239.
*reputed, bequest to*, 239.

WILD'S CASE,
*rule in*, 474.

WILL,
*after-acquired property, on, effect of*, 5, 57, 100.
*agreement to leave property by, enforcing*, 510.
*alterations in*, 31, 48.
*attestation of*. See ATTESTATION, WITNESSES.
*blanks in*, 15.
*capacity to make*, 8, 29, 30, 91. See CAPACITY OF TESTATOR.
*conditions in*. See CONDITIONS.
*construction of, maxims applicable to*, 449, 451.
*contingent*, 14.
*contradictions in*, 451.
*copy of, probate of*, 47.
*cypher, in*, 11.
*date from which, speaks*, 57.
*intention expressed in will as to*, 57, 58.
*depository for, of living person*, 543.
*destruction of*, 46 *et seq.* See REVOCATION.
*domicile, as affecting a*. See DOMICILE.

WILL—*continued.*
*duress, made under*, 98.
*erasures in*, 50.
*execution of.* See EXECUTION.
*foreign language, in*, 11.
*form of, unimportant*, 11, 118.
*fraud, obtained by*, 98.
*illness, made during*, 98.
*impeaching*, 92 *et seq.*
*inconsistent, several*, 40.
*incorporation of documents in*, 17.
*infants*, 8, 30, 91.
*instructions for, suggestions as to taking*, 121.
*interlineations in*, 48 *et seq.*
*interpolations in*, 13, 48.
*by fraud*, 13.
*mistake*, 13.
*lost*, 46.
*lunatic, by*, 93.
*married woman, by*, 9, 92, 138. See MARRIED WOMAN.
*meaning of word in Wills Act*, 1.
*gathered from whole instrument*, 118.
*minor's*, 8, 30, 91.
*missing*, 46.
*mistakes in*, 13.
*as to effect of*, 449.
*mutual*, 510.
*obliterations in*, 50.
"*only*," *meaning of*, 442.
*paper for*, 10.
*preparing, suggestions as to*, 121 *et seq.*
*printed*, 11
*professional aid in making*, 118.
*property disposable by*, 2 *et seq.*
*publication of*, 35.
*punctuation of*, 136.
*registration of.* See REGISTRATION.
*revival of.* See REVIVAL.
*revocation of.* See REVOCATION.
*seaman's*, 31 *et seq.*
*setting aside*, 9 *et seq.*
*several, existence of*, 40.
*sheets of*, 26.
*signature to*, 10 *et seq.* See EXECUTION.
*soldier's*, 29, 30 *et seq.*
*substance of, probate of*, 47.
*suggestions as to taking instructions for and preparing*, 121 *et seq.*
*undue influence used to obtain*, 96.
*unsound mind, by person of*, 92 *et seq.*
*witnesses to.* See WITNESSES, ATTESTATION.
*writing, must be in*, 10.
*pencil*, 11.

WILLS ACT, 1 Vict. c. 26,
*alterations affected by*, 87 *et seq.*
*before, general condition of law*, 87.
*colonies, adoption in, of*, 80.
*construction of terms in*, 1.
*donatio mortis causâ, does not apply to*, 118.
*enactments relating to wills not repealed by*, 33, 517.
*Scotland, does not extend to*, 80, 118.
*time when, came into operation*, 80.

WILLS ACT AMENDMENT ACT, 15 & 16 Vict. c. 24...82
*interpretation of "will" in*, 85.
*retrospective operation of*, 85.
*short title of*, 85.

WINCHESTER COLLEGE,
*devises of lands to*, 369.

WINES. See CONSUMABLE STORES.

WITNESSES. See ATTESTATION, SIGNATURE.
*affidavit of, as to alterations in will*, 49.
*attestation clause wanting or imperfect, where*, 24.
*competency of, attesting*, 36.
*death of*, 24.
*evidence of, conflicting*, 25.
*inaccurate or imperfect*, 25.
*executors as*, 38
*gifts to, attesting codicil*, 37.
*will*, 36 *et seq.*
*creditor, being*, 38.
*husband or wife of*, 36.
*joint tenants, in case of*, 37.
*solicitor authorised to charge profit costs, where*, 36, 359.
*trustees, as*, 38.
*illiterate*, 25.
*knowledge of, as to nature of document*, 35, 105.
*legatees as*, 37.
*marksman as*, 26.
*memory of, defective*, 24.
*minors as*, 24.
*number of*, 10, 105.
*out of jurisdiction*, 24.
*presence of, with respect to each other and testator*, 21, 105.
*what constitutes*, 23.
*selection of*, 107, 140.
*signature by*, 10 *et seq.*, 26.
*acknowledgment of prior*, 27.
*cutting off*, 45.
*initials by*, 27, 105.
*mistake in*, 26.
*place for*, 105.
*seal, by*, 26.
*tracing over previous*, 27.

WITNESSES—*continued.*
*who should be*, 140.
*not be*, 36, 105.

WOOD-RENTON, MR.,
*his book on lunacy referred to*, 95.
*his eight propositions on the law*, 95.

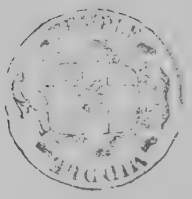
WORDS. See CONSTRUCTION.
"*and*," 317, 474.
"*authorise and empower*," 225.
"*bank stock*," 233.
"*bequest*," 90.
"*between*," 224.
"*chattels*," 166.
"*children*," 203.
"*contents thereof, with the*," 165.
"*cousins*," 204.
"*descendants*," 231.
"*desire*," 225.
"*devise*," 90.
"*die without issue*," "*without leaving issue*," 72.
"*easements and appurtenances*," 158.
"*effects*," 160, 166.
"*eldest son*," 500.
"*entreat*," 225.
"*equally*," 224, 376.
"*estate*," 160.
*and effects*," 160.
"*executors or administrators*," 226 *et seq.*
"*family*," 205, 230.
"*furniture*," 165.
"*goods*," 165.
"*goodwill*," 464.
"*heirs*," 230.
*of the body*," 397.
"*household goods*," 165.
"*in or about*," 164.
*near*," 162.
"*in the fullest confidence*," 225.
"*intent, to the*," 419.
"*issue*," 397.
*male*," 230.
*die without*," "*without leaving*," "*having no*," 72.
"*lands*," 161.
"*legacy*," 90.
"*legal or personal representatives*," 226 *et seq.*
"*longest liver*," 295.
"*messuage*," 161.
"*money*," 234.
"*moneys owing*," 234.
"*my*," 58, 59.
"*nephews*," 204.
"*nephews and nieces*," 238.

WORDS—*continued.*
"*next of kin*," 376.
"*nieces*," 204.
"*not doubting*," 225.
"*offspring*," 230.
"*only will*," 442.
"*or*," 317, 474.
"*others*," 223.
"*participate*," 224.
"*pecuniary investment*," 234.
"*plant*," 464.
"*premises*," 162.
"*property*," 160.
"*ready money*," 234.
"*recommend*," 225.
"*relations*," 205.
"*request*," 225.
"*residuary legatees*," 160.
"*residue*," 167.
"*rest*," 167.
"*securities*," 234.
"*seised*," 179.
"*servants*," 232.
"*share*," 162.
"*share and share alike*," 224, 376.
"*surplus*," 167.
*money*," 233.
"*survivors*," 223.
"*tail male*," 397.
"*testament*," 90.
"*then*," 460.
"*thereunto belonging*," 165.
"*things*," 165.
"*trustees for the time being*,' 198.
"*unmarried*," 318.
"*use and enjoyment*," 471.
"*use and occupation*," 471.
"*used therewith*," 164.
"*well know*," 225.
"*what is left*," 167.
"*widow*," 395.
"*wife*," 149.
"*will and desire*," 225.
"*wish and request*," 225.

Recat. AD
8-84

THE END

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, LONDON AND BECCLES.



June 22 1910.

THE

# "LAWYER'S ANNUAL LIBRARY."

## PRACTICE—CASES—STATUTES.

ANNUAL PREPAID SUBSCRIPTION.

| | | | | |
|---|---|---|---|---|
| SERIES **A** (comprising | Nos. 1, 2*, 3, 4, 5, 6**) | **£2 18s.** | Carriage 2s. extra. |
| do. **B** ( ditto, | Nos. 1, 2*, 3, 4, 6**) ... | **£2 8s.** | |
| do. **C** ( ditto, | Nos. 3, 4, 5, 6**) ... | **£2 5s.** | |

1. **THE ANNUAL PRACTICE.** By B. FOSSETT LOCK, M.A., Barrister-at-Law; CHARLES BURNEY, a Master of the Supreme Court; and F. A. STRINGER, of the Central Office, Royal Courts of Justice. In one handy vol. printed on thin paper, or in 2 vols. 8vo. Price 25*s. net.* (*Published at commencement of Michaelmas Term.*)

2. **THE A B C GUIDE TO THE PRACTICE OF THE SUPREME COURT.** To which is added a Diary for Notes of Appointments, &c. By F. R. P. STRINGER, of the Central Office, Royal Courts of Justice. Price 5*s. net.*

3. **THE QUARTERLY AND ANNUAL DIGEST OF ALL THE REPORTED DECISIONS IN ALL THE COURTS.** By JOHN MEWS, LL.M., of the Middle Temple, Barrister-at-Law. (*Issued in Three Quarterly, cumulative parts, and complete in* 1 *vol. royal* 8*vo, cloth.*) Price 17*s. net.*

4. **THE ANNUAL STATUTES OF PRACTICAL UTILITY.** Alphabetically arranged with Notes, &c., by W. HANBURY AGGS, Barrister-at-Law. Royal 8vo, cloth. Price about 10*s.* (*Usually Published in October.*)

5. **THE ANNUAL COUNTY COURTS PRACTICE.** By His Honour Judge SMYLY, K.C., and W. J. BROOKS, Barrister-at-Law. In one handy volume on thin paper, or in two vols. Price 25*s.* (*Published in January.*)

6. **THE MAGISTRATE'S GENERAL PRACTICE.** A Compendium of the Law and Practice relating to Matters occupying the Attention of Courts of Summary Jurisdiction. By C. M. ATKINSON, of the Inner Temple, Stipendiary Magistrate for the City of Leeds. Price 20*s.*

* If the A B C Guide (No. 2) is not wanted 2*s.* 6*d.* may be deducted from Series **A** or **B.**

** If the Magistrate's Practice (No. 6) is not wanted 10*s.* may be deducted from any series.

*** *Subscription forms post free on application to*

**SWEET & MAXWELL, Limited, 3, CHANCERY LANE, LONDON.**

**340,000 POINTS OF LAW FOR £20.**

# The ENGLISH DIGEST SYSTEM

## 1550 to 1909.

| | Instalment Price. | Cash Price. |
|---|---|---|
| 1. THE DIGEST OF ENGLISH CASE LAW, 1550-1897. 16 vols. £20 0 0 ... | £17 0 0 ... | £16 0 0 |
| 2. THE DECENNIAL DIGEST, 1898-1907. 2 vols. ... £3 3 0 ... | 2 13 6 ... | 2 10 6 |
| 3. THE ANNUAL DIGEST, 1908. Each year ... ... 15s. ... | 12 9 ... | 12 0 |
| 4. THE QUARTERLY DIGEST (with Annual). Extra, net. ... 5s. ... | 5 0 ... | 5 0 |
| 5. THE DIGEST OF OVERRULED CASES. 1600-1906. 3 vols. £5 5 0 ... | 4 9 3 ... | 4 4 0 |

**SPECIAL REDUCED PRICE, Nos. 1, 2, 5, 21 0 0 ... 20 0 0**

**THE ENGLISH DIGEST** deals with about 300,000 cases.

**THE DECENNIAL DIGEST** contains the pith of about 9,000 cases. It is the cheapest, most accurate and best arranged ten years' Digest, and is the only one that can be used satisfactorily with the English Digest.

The Cases in the **ANNUAL DIGEST** are in most instances digested by the actual reporter, and are therefore accurate summaries. Cases in all the series of Reports are digested.

**THE OVERRULED DIGEST** presents in a form convenient for reference the history of the various cases that have been adversely discussed. About 30,000 cases have been dealt with.

**Sweet & Maxwell will be pleased to send any or all the above to any solicitor *on approval* for a fortnight, and will *pay carriage both ways* if the books are not kept.**

**If desired, payments extending over eighteen months or two years can be arranged.**

SWEET & MAXWELL, Limited, 3, CHANCERY LANE, LONDON.